

1 UNITED STATES DISTRICT COURT

2 EASTERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA, . Docket No. 1:23-CR-00082-EK
 4 Government, .
 5 v. . Brooklyn, New York
 6 CARLOS WATSON, ET AL., . Friday, April 26, 2024
 7 Defendants. . 10:10 a.m.
 8

9
 10 TRANSCRIPT OF MOTION HEARING
 11 BEFORE THE HONORABLE ERIC R. KOMITEE
 12 UNITED STATES DISTRICT JUDGE

13 APPEARANCES:

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P R O C E E D I N G S

THE CLERK: This is the United States of America against Carlos Watson, et al., docket number CR-23-82. For the Government, please state your name for the record.

MR. SIEGEL: Good morning, Your Honor. Jonathan Siegel, Gillian Kassner, and Dylan Stern for the United States, and also joined at counsel table with the Court's permission, with paralegal specialist, Jake Menz.

THE COURT: Good morning.

THE CLERK: For Mr. Watson?

MR. SULLIVAN: Good morning, Your Honor. Ronald Sullivan on behalf of Carlos Watson, who is present.

THE COURT: Good morning to you, Mr. Sullivan, and Mr. Watson, good morning to you as well.

MS. FRISON: Good morning, Your Honor. Shannon Frison for OZY Media.

THE COURT: Good morning, Ms. Frison. All right. So we probably have a fairly comprehensive agenda today. Pre-trial motions that have been with me for a while, I'm going to issue an order on today. We will not be dismissing the indictment for failure to state an offense, which I'm sure does not come as a surprise to anyone, or for selective prosecution. And I will not be granting discovery on that issue either because I don't see a prima facie case even having been made out or anything close there to.

1 I've read the motions in limine from the
2 Government. I don't believe I've received any motions in
3 limine from the defense, other than the defense response to
4 the Government's motions. I see that we have had motions
5 filed relatively late last night. I have not read those, but
6 we can begin to talk about them perhaps today.

7 Beyond that, my agenda for this morning is to just
8 chart the path between here and jury selection, and then
9 opening statements themselves, talk maybe a little bit about
10 the division of labor between me and the magistrate judge who
11 will be presiding over jury selection with the defendants'
12 consent. That's defendants plural. Ms. Frison, I'm not sure
13 if you or your predecessor had consented, but I believe we
14 have both defendants' consent to jury selection by a
15 magistrate judge.

16 All right. Why don't we start with the motions
17 filed last night? Those were one, a motion to dismiss the
18 case, if I understand it correctly, on grounds that the
19 remaining tweets prejudice the jury pool?

20 MR. SULLIVAN: Yes, Your Honor. That's the first
21 motion. Apologies for my voice. I'm under the weather. For
22 everyone --

23 THE COURT: Sorry to hear that.

24 MR. SULLIVAN: -- I've tested all week negative,
25 including this morning, but it's an old-fashioned cold.

1 THE COURT: People, in my view, have tended to
2 forget over the last few years that there are lots of
3 maladies in the world besides COVID --

4 MR. SULLIVAN: That's right.

5 THE COURT: -- that continue to exist.

6 MR. SULLIVAN: I didn't want to scare anybody. So
7 including this morning, I'm negative. So it was brought to
8 our attention that the very texts that the Government
9 volunteered to remove still exist on the United States
10 Attorney's Twitter account, that is, calling Mr. Watson a con
11 man and OZY a criminal organization. We certainly rely on
12 Government's representation that they were going to remove
13 that language. And they did from the --

14 THE COURT: They took down the press release, or
15 amended --

16 MR. SULLIVAN: I'm sorry, Your Honor?

17 THE COURT: Did they take down the press release or
18 they amended the press release?

19 MR. SULLIVAN: They amended the press release, but
20 I mean, that's a pirate victory, if it's going to remain
21 online on Twitter. And we put in our motion the number of
22 hits that we were able to discern, and it's alarming. So the
23 motion is twofold. The motion is a motion to dismiss the
24 indictment on substantive due process grounds, or in the
25 alternative, to change venue.

1 THE COURT: Yeah. So I would expect -- I'm not
2 going to rule on this now, but I'm going to tell you that on
3 first blush, your motion seems A, untimely, because you're
4 not saying that these are new facts, right? You could've
5 checked the Government's social media profile at the same
6 time you were litigating about the press release. I think
7 it's pretty well-known that U.S. attorneys run Twitter feeds
8 these days, point 1. And point 2, individual tweets, I
9 daresay, are like drops of water in the ocean of online
10 information that we all swim in these days.

11 And you know, I think my original ruling made
12 fairly clear that my issue with the Government was about
13 literal compliance with the Court's local rules, more than it
14 was about any sort macro level concern about, you know, taint
15 of a jury pool really rising to the level of a constitutional
16 or other legal violation. And so, you know, the Government
17 can take whatever approach it wishes at this point with
18 respect to that --

19 MR. SULLIVAN: Well, if I may be heard --

20 THE COURT: -- but I think we'll have no problem
21 impaneling a fair jury on that. I don't want to have
22 argument on this now, because it really is a late date to be
23 taking up this subject.

24 MR. SULLIVAN: Well, Your Honor, if I just found
25 out about it, I'm under no affirmative obligation to run

1 around following their Twitter feed. I'm not even on
2 Twitter. But the jury pool is certainly on Twitter. There
3 is no case in --

4 THE COURT: You are under an --

5 MR. SULLIVAN: -- this jurisdiction or any other
6 that --

7 THE COURT: You are under an affirmative --

8 MR. SULLIVAN: -- obligates me to run around,
9 following their Twitter, Your Honor. So if I just found out
10 about it, I can't sit silent --

11 THE COURT: You made a motion --

12 MR. SULLIVAN: -- and then get prejudiced. That's
13 unfair. That's prejudice to him.

14 THE COURT: Mr. Sullivan, I respect your
15 intelligence way too much to believe that you actually buy
16 the argument that you're making right now.

17 MR. SULLIVAN: I actually buy the argument that I'm
18 under no obligation to follow the Government's Twitter.

19 THE COURT: You're under an obligation to make
20 whatever pre-trial motions you want to make by the deadline
21 for pre-trial motions, and if you're already keyed into the
22 issue of pre-trial publicity and filing a motion on that
23 subject, the idea that you would ignore their Twitter feed in
24 the process strikes me as far-fetched at best. But let's
25 call this subject concluded for the moment. The second

1 motion you made --

2 MR. SIEGEL: Your Honor, I apologize. You having
3 said it's concluded, there is one thing that I think is
4 important to just -- that I think sort of clears the air of
5 some of this.

6 THE COURT: One sentence to clear the air.

7 MR. SIEGEL: I think part of the reason Mr.
8 Sullivan may not have been aware of this is that despite his
9 claims about affecting the jury pool, as it may not surprise
10 you, the U.S. Attorney's Office's Twitter account doesn't get
11 a lot of follows or views.

12 THE COURT: Shocking.

13 MR. SIEGEL: And you can actually see on Twitter
14 how many views the post is, and I'm just going to hand it up.

15 THE COURT: This is factual argument on a subject
16 that I don't need any factual argument on. But if you want
17 to drop me a letter that attaches whatever -- or you can just
18 hand it to -- yeah. You can hand a piece of paper --

19 MR. SIEGEL: Yeah. I'm going to hand it up.

20 THE COURT: -- that we'll mark as Court's Exhibit 1
21 for today's purposes. Remind me what the second motion is?

22 MR. SULLIVAN: The second motion has to do with
23 attorney-client privilege. In the 3500 material that was
24 disclosed, we learned that the Government read, used,
25 interviewed their witnesses with material that's protected

1 under the attorney-client privilege. Prior counsel, both
2 King & Spalding, and then Dechert entered into agreements
3 with an accounting company, clearly attorney-client
4 privilege. In fact, King & Spalding hired one of the
5 companies itself but --

6 THE COURT: What's the actual material we're
7 talking about?

8 MR. SULLIVAN: It's accounting material that deals
9 with revenue of OZY Media. It does a revenue analysis of OZY
10 Media's revenue. And that company sat in defense meetings
11 and it's as though the Government was in our offices
12 discussing defense theory, because it explains --

13 THE COURT: Let me just paraphrase what I --

14 MR. SULLIVAN: -- much of our defense theory. Yes,
15 Your Honor.

16 THE COURT: If I understand correctly, Defense
17 counsel hires an accountant, maybe we would call them a Kovel
18 accountant, maybe not. I can't remember. To assist in
19 preparing this case for trial. The idea is that because
20 they've been engaged by Defense counsel, the accountant's
21 work is going to be attorney work product. They're asked to,
22 you know, reexamine the financial position and reporting of
23 OZY and determine how much it actually was earning,
24 notwithstanding either published financial statements or
25 representations by the defendants.

1 And the Government ends up -- this is KPMG, you
2 said? Which firm?

3 MR. SULLIVAN: No. It's Bland & Waxman, and what's
4 this other one? BRG.

5 THE COURT: Two accounting firms?

6 MR. SULLIVAN: Yes.

7 THE COURT: Bland & Waxman and BRG, and somehow
8 that work product that you view as protected by the attorney
9 work product doctrine ends up in the hands of the Government.

10 MR. SULLIVAN: By both the attorney-client
11 privilege and the work product doctrine. Yes.

12 THE COURT: Okay. And you say it gets to the
13 Government via the cooperators, or you don't say?

14 MR. SULLIVAN: I'm sorry?

15 THE COURT: How does the material get into the
16 Government's hands?

17 MR. SULLIVAN: Well, the Government accessed all of
18 our records, and then it went through the Government's taint
19 team --

20 THE COURT: Accessed all your records how?

21 MR. SULLIVAN: Through subpoenas and whatnot. Or
22 the corporate records. And everything went through a taint
23 team, and the taint team apparently determined that they
24 didn't think it was --

25 THE COURT: Oh you're saying you produced this?

1 MR. SULLIVAN: It was relevant. No. I'm not
2 saying I produced it. No.

3 THE COURT: You just said --

4 MR. SULLIVAN: It was in response to either a
5 subpoena or after Mr. Watson was arrested, the Government
6 subpoenaing the materials from OZY Media. Everything went
7 through a taint team.

8 THE COURT: I'm seeing three possibilities here.
9 So one is, you know, the Government sees Mr. Watson's devices
10 at the time of his arrest, and then applied for and obtained
11 search warrants to seize those. That's choice one. They got
12 the stuff in the course of the search. Choice two is they
13 sent you subpoenas and you produced things. You should've,
14 obviously, withheld, or OZY's counsel should've withheld
15 anything that you thought was privileged or attorney work
16 product. That's choice two.

17 Choice three would be the cooperators walked in and
18 handed this stuff to the Government. And I'm sure there are
19 more choices also, but do you know whether it's choice A or
20 choice B?

21 MR. SULLIVAN: My understanding is that most of it
22 is choice A, but I would have to look at the production more
23 closely.

24 THE COURT: Well, that's going to make a
25 difference.

1 MR. SULLIVAN: This more than literally just came
2 to my mind -- just came to my attention.

3 THE COURT: Yeah. If the way the Government gets
4 this stuff is that you produced it to them with no claim of
5 attorney privilege or attorney work product, that seems
6 potentially relevant to the analysis here.

7 MR. SULLIVAN: That clearly did not happen.
8 Everything is marked attorney-client privilege, so I know my
9 office didn't produce anything. So to extent it was
10 produced, if it was produced via subpoena, it would've been
11 clearly marked, but I think it's that first bucket, the A
12 bucket or 1 bucket, however.

13 THE COURT: I mean, I'm not going to put the
14 Government on the spot here, because --

15 MR. SIEGEL: I can answer it. I know the answer to
16 all of this.

17 THE COURT: Yeah.

18 MR. SIEGEL: None of this came from Mr. Watson's
19 phone. In the letter or motion, they talk about three
20 individuals. There's David Slayton from BRG, there's Joseph
21 Clemente from Waxman & Bland, and then there's Frank Bland
22 from Waxman & Bland.

23 So just to take those in order, we sent a subpoena
24 to BRG. OZY was notified of that subpoena, and we have a
25 written waiver from OZY that they are not asserting to

1 privilege as to either of the documents from BRG or the
2 interview with Mr. Slayton. And I have a copy of that which
3 I can gladly pass to the defense counsel and pass up to the
4 Court. So that's BRG and Mr. Slayton.

5 THE COURT: Can we just pause there for a second?
6 That seems kind of dispositive of the BRG issue.

7 MR. SULLIVAN: I certainly haven't seen a waiver
8 from OZY.

9 THE COURT: Maybe we can resolve all this
10 efficiently then. It sounds like we may just have a
11 miscommunication.

12 MR. SIEGEL: Your Honor, should I pass it up?

13 THE COURT: Yeah. Please.

14 MR. SIEGEL: And Your Honor, just to note, the
15 sender is Alexander Shapiro from Ford O'Brien, which is OZY's
16 former counsel.

17 THE COURT: Okay. Can I just make a comment here
18 on the efficient operations of this kind of litigation? You
19 know, things get inadvertently produced all the time that the
20 producing party, nevertheless, wants to assert a privilege
21 over. And in my experience, the kind of usual routine that
22 follow is before anybody runs into court and starts
23 litigating those issues, the defense calls the Government and
24 says, "Look. We produced this material. We think we may
25 have done so inadvertently. We did not mean to waive any

1 applicable privilege. Will you return it?", and there's a
2 conversation that follows between lawyers of good faith for
3 both sides, in which they see whether they can figure things
4 out themselves.

5 That kind of conversation here might have resolved
6 in the parties agreeing on how to proceed. It might not
7 have. But at least you would've been more informed about the
8 factual background here. Like, pick up the phone and call
9 the Government to the extent you have potential qualms about
10 their conduct, and see what they say. They may say, "We
11 don't want to talk to you about this. You know, go to the
12 judge." Or they may be able to say, "OZY's lawyers waived
13 the privilege." And I may be missing something as to this
14 email, but it seems on its face to be dispositive of the BRG
15 stuff.

16 MR. SULLIVAN: I mean, I have to look at it.
17 Obviously, two lawyers ago, with OZY, I don't know if it
18 encompasses the entire production or not, so I won't comment
19 on it now.

20 THE COURT: "This will confirm that we are not
21 asserting any privilege with regard to Mr. Slayton's
22 interview or the documents he is producing to you." All
23 right.

24 MR. SULLIVAN: I mean, maybe. I'm seeing this
25 initially.

1 THE COURT: It's not very long. All right. What
2 was the other thing from the Government?

3 MR. SIEGEL: So the next is Joseph Clemente.
4 Joseph Clemente was OZY's interim CFO. He worked to handle
5 OZY's books, and he met with investors as part of trying to
6 raise money for OZY in the time after the New York Times
7 article, before the indictment. When we interviewed Mr.
8 Clemente, he was represented by counsel. We specifically
9 asked if they had any kind of privilege relationship with
10 OZY, and we were specifically informed in writing that they
11 did not. And I can pass that around too. We also followed
12 up with Mr. Sullivan.

13 THE COURT: Was he the interim CFO at a time when
14 Mr. Watson was still CEO?

15 MR. SIEGEL: Yes. We also reached out to Mr.
16 Sullivan about this in August of last year. We specifically
17 asked, did they view that there was a privilege relationship
18 with Mr. Clemente? We got varying answers. First we were
19 told that he had a privilege relationship with OZY. We
20 pointed out that Kovel, the law is clear that you can't hire
21 your CFO through lawyers and assert that to be privileged.

22 They then switched and said, actually, it was a
23 privileged relationship with Mr. Watson. We asked them to
24 provide any basis for that or any documents for that. They
25 didn't do that, and then we emailed them to say that in light

1 of the fact that they --

2 THE COURT: I'm sorry. I thought this whole thing
3 was about litigation work product produced by outside Kovel
4 accounts. Why are we even talking about the in-house CFO?

5 MR. SIEGEL: Well, he was --

6 MR. SULLIVAN: Because at the time, he was a
7 consultant, not the CFO.

8 MR. SIEGEL: He was sort of a rent-a-CFO.

9 MR. SULLIVAN: At the time, he was a consultant,
10 not the CFO.

11 THE COURT: Consultant to whom?

12 MR. SULLIVAN: Consultant to OZY. So no, he was
13 not the CFO.

14 THE COURT: But not a consultant to any law firm.
15 A consultant to the company.

16 MR. SULLIVAN: Hired by the law firm to be a
17 consultant and help --

18 THE COURT: Hired by what law firm?

19 MR. SULLIVAN: -- the company. It was Dechert, the
20 Dechert law firm.

21 THE COURT: Do you have an engagement agreement
22 between Dechert and Mister --

23 MR. SULLIVAN: Yes. Absolutely. Absolutely.

24 THE COURT: Do you have it here?

25 MR. SULLIVAN: I can get it. I don't have it in my

1 file.

2 THE COURT: Okay. There's a lot of fact
3 development here.

4 MR. SULLIVAN: We can get it if you want it.

5 THE COURT: Maybe the Government can just put in a
6 letter on this subject within a week? Sooner if you choose.
7 I don't want to hash this out on the record here. Is a week
8 a sufficient amount of time? It can be a short letter.

9 MR. SIEGEL: Your Honor, in terms of the facts,
10 like just to get the facts out, that's fine. To the extent
11 you also want us to address all the legal issues that are
12 raised, I don't want to rush that.

13 THE COURT: I mean, I'm putting you to the task of
14 a full brief here. Seems like these are pretty
15 straightforward issues, and one or two sentences reciting the
16 facts with maybe one sentence pointing to a case. For
17 example, that says the in-house CFO can't be a Kovel
18 accountant or something like that. I leave it up to you to
19 decide what goes in and what goes outside the letter.

20 MR. SIEGEL: So then a week is fine, Your Honor.

21 THE COURT: All right.

22 MR. SULLIVAN: So I have it electronically, and
23 we'll follow up with letters, like Your Honor said. But
24 January 14th, 2022 engagement letter, which we understand he
25 gave to the Government. So the Government's saying, "Geez.

1 We asked them if there was any privilege," well, here's a
2 letter right here.

3 THE COURT: So you're talking about two different
4 roles, though, and that's why we need some factual
5 development perhaps. Companies have to have CFOs --

6 MR. SULLIVAN: Which was --

7 THE COURT: -- to the extent they have
8 complicated --

9 MR. SULLIVAN: And their CFO was their cooperating
10 witness, Mr. Rao.

11 THE COURT: Right. But it sounds like it's at
12 least possible, I don't know, that this person was playing
13 multiple roles, wherein one is I'm helping Mr. Watson and/or
14 OZY get ready for a trial. The other is, I'm working as the
15 CFO for this business that needs a CFO. And role number 1
16 might give rise to some work product protection. Role number
17 2, I don't think would. And so, you know, you're going to
18 need to clarify.

19 MR. SULLIVAN: I think Your Honor's right. I think
20 the New York courts take the functional approach to the
21 question how the individual functions. And we're confident
22 that the function --

23 THE COURT: Yeah. If he's the CFO for purposes of
24 producing a balance sheet that has to go to investors, like,
25 obviously that's not privileged activity. But let's take

1 this up on paper now that I understand the issues a little
2 better.

3 MR. SULLIVAN: Very well.

4 THE COURT: Okay. So motions in limine, there are
5 no defense motions in limine, correct?

6 MR. SULLIVAN: At this point, Your Honor, no. I
7 know we had a deadline.

8 THE COURT: Early March deadline.

9 MR. SULLIVAN: Yes. Subsequent to that deadline,
10 we received 3500 material, so depending on what we see in
11 there, I may or may not file additional motions in limine, or
12 motions in limine. I don't know. I'm not saying I have
13 anything in mind, but we've got thousands and thousands of
14 documents, so there may be something in there, which we want
15 to bring to the Court pre-trial. I could do it in the form
16 of a motion in limine. I could do it right before trial, but
17 the notion is to make the trial run smoothly if I see
18 something that I think is objectionable in 3500 material.

19 THE COURT: All right. Let's just go through the
20 table of contents in the Government's motions. Evidence
21 suggesting selective prosecution. I feel like Roman I, III,
22 and IV in the Government's argument section are all of apiece
23 with one another. Am I correct that the defense does not
24 intend to introduce any such evidence?

25 MR. SULLIVAN: Evidence of selective prosecution,

1 no, Your Honor. That's a matter before the Court, and we
2 understand the rules of court with respect to that.

3 THE COURT: Okay. So we have no dispute on
4 selective prosecution, evidence that will be excluded. Roman
5 III --

6 MR. SIEGEL: Your Honor, and I apologize. In their
7 opposition, the defense said that they're not going to argue
8 selective prosecution, but they should be allowed to get into
9 the Government's motive for the investigation. And I'm not
10 sure what the line of being drawn there is, but our view is
11 that all of that should be precluded.

12 MR. SULLIVAN: The Government's investigation is
13 always admissible. If the Government has a shoddy
14 investigation, the jury ought to hear it. I don't know that
15 that's going to be one of my theories of the case, but
16 investigation is clearly relevant.

17 THE COURT: But the Government's motives for
18 investigating Mr. Watson in the -- whether the investigation
19 was --

20 MR. SULLIVAN: That piece, I think the Government
21 is concerned that I'm going to try to argue the selective
22 prosecution motion.

23 THE COURT: Or selective investigation.

24 MR. SULLIVAN: Look, I've tried cases for
25 30-some-odd years. I mean, that's clearly improper. But

1 investigation is not improper. The Government's
2 investigation --

3 THE COURT: There are two aspects of this. And I'm
4 not saying anything about either of them at this point. The
5 Government's motives for investigating your client, that's
6 excluded. I want to be clear about that. The quality of the
7 Government's investigation, I think I might need to know more
8 about what you have in mind. If you're saying the Government
9 should've interviewed witness X but they didn't, maybe that's
10 admissible, maybe not.

11 MR. SULLIVAN: That would be subject to maybe a
12 missing witness instruction. I mean, some of these are
13 actual trial time motions, depending on what evidence the
14 Government puts on. But just the traditional notion of the
15 Government's investigation and whether it's adequate is
16 always relevant.

17 THE COURT: Adequacy as distinct from motive.

18 MR. SULLIVAN: As distinct from motive. I will
19 conceded that.

20 THE COURT: Okay. Yeah. We won't have any
21 testimony about the Government's motives for either
22 prosecuting or investigating this case, those being as we
23 seem to have all agreed, questions for the Court and not the
24 jury.

25 MR. SULLIVAN: Correct.

1 THE COURT: All right. But then Roman III,
2 evidence or argument that inflating financial figures was a
3 common practice in the media industry or the VC space. Do we
4 have agreement on that?

5 MR. SULLIVAN: No. I think custom and practice
6 evidence is always admissible. The notions of --

7 THE COURT: Isn't this other people were doing it
8 too?

9 MR. SULLIVAN: I'm sorry. No. Very different.
10 Very different. And the Second Circuit is clear on other
11 people are doing it too. That line of cases has to do with
12 other people are engaging in crimes too. Ours is distinct.
13 We are saying that it is not a crime in negotiations to bluff
14 and engage in puffery. It is a --

15 THE COURT: What does bluff mean?

16 MR. SULLIVAN: The same as puffery for lawyers, but
17 businesspeople use the word bluff, and that is they will
18 say -- you know, let's take the Litvak cases, because this
19 sort of evidence --

20 THE COURT: I'm familiar with the Litvak case. The
21 Government's motion is keyed specifically to inflating
22 financial figures.

23 MR. SULLIVAN: Right. So we disagree with the
24 Government's premise that financial figures are inflated, but
25 what we do is -- no. I just saw the Court's eyebrows raise.

1 THE COURT: No. I'm saying of course that --

2 MR. SULLIVAN: No. We absolutely don't.

3 THE COURT: That's the heart of the case.

4 MR. SULLIVAN: That is the heart of the case, and
5 we think the Government is wrong. We also think that custom
6 and practice evidence is always admissible. And if it is the
7 custom and practice in this industry to engage in bluffing or
8 puffery, and we have an expert witness, PhD from Duke --

9 THE COURT: About financial reporting?

10 MR. SULLIVAN: About the financials of the company.
11 So the reporting, what's on the piece of paper is on the
12 piece of paper. What comes out of somebody's mouth in
13 negotiation clearly falls into the area of custom and
14 practice in the industry. And the jury has a right to know
15 what the custom and practice of an industry is if they're
16 going to determine what a reasonable investor might believe.
17 This is a well-known custom.

18 THE COURT: So if it's the custom of the industry
19 to lie about financial performance, that's relevant here?

20 MR. SULLIVAN: No. Custom of an industry to engage
21 in puffery or bluffing. Very different from lying. Our
22 theory of the case is that Mr. Watson did not lie about
23 anything, and we're going to show that. Didn't lie about
24 anything. Now, to the extent there may have been some
25 puffery or bluffing, that is absolutely industry standard.

1 So, look, Your Honor, when you go in --

2 THE COURT: Can you give me an example of something
3 that would not be a lie but would be puffery or bluffing
4 within your taxonomy?

5 MR. SULLIVAN: Our company is the next Microsoft in
6 the VC space. Our company's the next Microsoft. That's a
7 big claim. That's not a lie. That may be puffery. That may
8 be bluffing. Clearly not a lie. Our company is the next
9 Tesla. That's the way that they talk in this industry, and
10 it is commonly -- otherwise, Your Honor, you'd arrest the
11 whole world. I've got this restaurant for sale, and I think
12 it's going to generate \$2 million in net revenue next year
13 because of the NBA championships are coming to town.

14 THE COURT: So we can all draw the distinction that
15 the securities laws regularly draw on the civil side between
16 past performance, which is actually knowable, and future
17 projections and predictions, which are just that.

18 MR. SULLIVAN: And all of his financials, they have
19 pro forma. Pro forma has to mean something. It's not mere
20 surplusage. They're making guesses about future performance.
21 An aggressive guess is not against the law. It's the way
22 that people do business.

23 THE COURT: Obviously, you can't have an expert
24 tell the jury what's against the law and what's not.

25 MR. SULLIVAN: Of course not.

1 THE COURT: That's the Court's role.

2 MR. SULLIVAN: But the witness can say what is
3 common in this industry based on reams of literature in the
4 industry about this VC world, that it is customary and is the
5 practice of the industry to engage in forms of bluffing.

6 THE COURT: Who is the expert?

7 MR. SULLIVAN: David Robinson, a finance professor
8 at Duke, PhD, Chicago, renowned expert in these areas.

9 THE COURT: Does the Government have his report
10 now?

11 MR. SULLIVAN: Yes.

12 THE COURT: As of when?

13 MR. SULLIVAN: I don't have the date handy.

14 THE COURT: Because when you filed the response to
15 the motions in limine, I think you were saying, "We don't
16 know who this person is."

17 MR. SULLIVAN: Correct.

18 MR. SIEGEL: Yeah. I think we got it two weeks ago
19 and we addressed it in our reply.

20 THE COURT: Okay.

21 MR. SULLIVAN: So there is a line between
22 puffery --

23 THE COURT: Do I have a copy of this report?
24 Because that would help rule on the admissibility of his
25 testimony.

1 MR. SULLIVAN: I think I filed it --

2 MR. SIEGEL: Your Honor, I have a copy that I can
3 pass to you.

4 THE COURT: Yeah. Please.

5 MR. SULLIVAN: Yeah. I believe I filed it on the
6 record, Your Honor.

7 MR. SIEGEL: Actually, I apologize, Your Honor.
8 That wasn't attached as an exhibit. I don't have a copy of
9 that one.

10 THE COURT: But it's on the docket?

11 MR. SULLIVAN: I think so. If not -- yes. It's on
12 the docket, I'm told. So there clearly is a line between
13 bluffing and misrepresentation, and that's clear just like
14 involved contract.

15 THE COURT: Let me put this to the Government.
16 Let's say that your case-in-chief has you presenting evidence
17 not only about what you contend are objective misstatements
18 about actual performance, but also all kinds of evidence
19 about aggressive predictions as to the future. A, is that
20 something we should expect, and B, would that give rise to
21 any relevance of, you know, how common are these kinds of
22 predictions and what are the typical ways in which people
23 approach them and expect to hear them?

24 MR. SIEGEL: So, Your Honor, as I think you've
25 zeroed in on, the vast majority virtually aren't higher cases

1 without historicals. What was our revenue last year? To the
2 extent there are projections, I think there may be some
3 examples where, in September someone says, "This is how we're
4 doing this year," or September, October, December, where
5 investors would say, "By that point, I would really expect
6 this to be a number that has quite a bit of meaning."

7 THE COURT: Well, yeah. And if they're speaking
8 about how they have done for the prior eight or nine months,
9 that's also notable.

10 MR. SIEGEL: Yeah. But in terms of, this is how
11 we're going to do next year, we haven't alleged that any of
12 that is fraudulent in this case. And in terms of, "We're
13 going to be the next Microsoft," or "We're going to be the
14 next Tesla," there's not going to be any allegations or
15 arguments that any of that is fraudulent.

16 THE COURT: Yeah. I mean, that would be a third
17 basis on which to preclude this expert's testimony. Basis
18 one would be the discovery failures. Basis two would be, you
19 know, the 702 analysis that, you know, this is not
20 appropriate subject matter for an expert, or the science, so
21 to speak, is not there to back it up. Basis three would be
22 this just isn't relevant to meet the Government's evidence,
23 because they're not arguing that it was the forward-looking,
24 highly general predictions of, this company's going to be the
25 next New York Times.

1 MR. SULLIVAN: Except they are.

2 THE COURT: Well, we'll see. Yeah.

3 MR. SULLIVAN: I mean, it's in the indictment.

4 THE COURT: What is?

5 MR. SULLIVAN: For example, "I expect X millions of
6 dollars from Donor Y." That's future. That's a future
7 claim.

8 THE COURT: Show me where that is in the
9 indictment.

10 MR. SULLIVAN: Just a minute, Your Honor. We'll
11 find it.

12 MR. SIEGEL: Your Honor, to the extent --

13 MR. SULLIVAN: And there's also -- sorry, Counsel.
14 And also, I'll point it before Your Honor, that both the
15 labels pro forma and unaudited applies to past financials as
16 well as future financials.

17 THE COURT: So it's okay to lie on your unaudited
18 financial statements?

19 MR. SULLIVAN: Well, that's your word. So
20 they're --

21 THE COURT: I'm asking. It's my question.

22 MR. SULLIVAN: It is okay to make aggressive
23 predictions in pro forma and unaudited financials. And no,
24 not an outright lie. And we're going to show that none of
25 them are outright lies. They're based on something, but they

1 may be aggressive.

2 THE COURT: Sorry. Pro forma financial is about
3 what? If you produce a pro forma earnings statement that
4 says -- I think we may be in need of a definition of pro
5 forma here.

6 MR. SULLIVAN: Pro forma, it means, essentially,
7 best estimate at the time, and it deals both with past and
8 with future. But it's the best estimate.

9 THE COURT: Going back to the question of a minute
10 ago, where is the place in the indictment where the
11 Government alleges forward-looking statements to be
12 fraudulent?

13 MR. SULLIVAN: We're looking for it, Your Honor.
14 Right. So Harry Ox (ph.), for example.

15 THE COURT: What paragraph?

16 MR. SULLIVAN: Throughout all the Series C. We're
17 looking for it, Your Honor.

18 THE COURT: Misrepresentations to Series C investor
19 3.

20 MR. SULLIVAN: I have the indictment at hand.
21 We'll find it. We'll find it. But throughout the Series C,
22 Your Honor, they claim that --

23 THE COURT: Just humor me and find this before we
24 move on, because that'll help concretize.

25 MR. SULLIVAN: I'm happy to humor the Court.

1 (Pause)

2 MR. SULLIVAN: So let's look at paragraph 17, Your
3 Honor. That's an example where the Government alleges,
4 essentially, that the two 2018 revenue forecasts was known to
5 Mr. Watson at the time, that he was not going to be able to
6 reach it. Forecast, necessarily, is forward-looking.

7 THE COURT: Where? What sentence are you talking
8 about?

9 MR. SULLIVAN: Page 5 of the indictment. Paragraph
10 17. It's the last sentence.

11 THE COURT: That's talking about the revenue they
12 had booked. Past tense.

13 MR. SULLIVAN: Had forecast 2022.

14 THE COURT: Right.

15 MR. SULLIVAN: There's also --

16 THE COURT: Oh 2018. Yeah. So the rule about
17 forward-looking statements is it's not a basis for a
18 liability to get them wrong in good faith, but when you make
19 forward-looking statements that you don't believe to be
20 achievable or you know for a fact are not achievable, that's
21 actionable. We're going to have some homework to do on the
22 jury instructions here. That's where all the rubber is going
23 to meet the road. It may well be that the jury instructions
24 inform, once they settle, my assessment of this expert's
25 testimony.

1 I want to be expansive about this. Obviously, the
2 jury can and should be entitled -- you should be entitled to
3 present a full picture to the jury of how much is knowable at
4 a given point in time, how much is inherently speculative,
5 how revenue estimates work. What is the process from
6 actually earning the revenues to actually accounting for
7 them? How long does that process take? How much uncertainty
8 is there along the way?

9 It seems to me that all of that is imminently fair,
10 right? If you're going to say he made a revenue forecast
11 that he had to know based on year-to-date performance he was
12 not going to achieve, the defense should be able to provide a
13 full picture of how that forecasting process works. But that
14 seems to be an imminently different thing from saying you're
15 allowed to bluff, you're allowed to puff, and everybody does
16 it. Let's say this. My preliminary ruling is that until
17 further notice, we're not going to have testimony about what
18 everybody does when it comes to bluffing.

19 MR. SULLIVAN: So no custom and practice evidence
20 can come in --

21 THE COURT: Custom and practice of what?

22 MR. SULLIVAN: Custom and practice of the way that
23 early stage companies talk to investors. That's all I'm
24 asking for. And here, 27, I found what I was looking for.
25 Page 9, last sentence, Rao claims Series C investor had

1 invested 10 million. This actually, the facts will show,
2 references a future investment that was to come. May not
3 have actually come, but was made in good faith. The custom
4 and practice of an industry to make aggressive claims about
5 future earnings has to be fair game.

6 So in the paragraph that Your Honor just looked at,
7 as Your Honor said, some things are highly speculative,
8 particular last quarter, fourth quarter, before what those
9 numbers are going to show. Given the ebbs and flows of this
10 particular industry, to make an aggressive projection for a
11 Q4 is within bounds, and it's not a lie. And even if it is,
12 a lie is not the end of the story. It has to be material.

13 THE COURT: What's in bounds and what's out of
14 bounds, that's why I'm here, is to tell the jury what's in
15 bounds and what's out of bounds, in terms of the statute.

16 MR. SULLIVAN: Is bounds is to make, in good faith,
17 aggressive predictions about what the company is going to do.
18 That, in short, is bluffing or puffery or what have you. No
19 one is sitting here lying. No one is sitting here saying
20 that the Courts say that yes, it's okay to tell boldface
21 lies. But that has to be contextualized, Your Honor. You
22 know, if we're just going to go with the Government's theory,
23 then I don't even need to be here.

24 We have our own theory. And our theory, part of
25 our theory is that this is way early stage investors and

1 companies spoke to each other. Everybody understood that
2 it's pro forma, it's unaudited, and they know that it might
3 be off a little bit, but that's not securities fraud. But
4 they made a good faith estimate at the sorts of numbers they
5 were going to do, and a jury has the right to hear that, Your
6 Honor. They have absolute right to hear that.

7 THE COURT: What's the expert going to say?

8 MR. SULLIVAN: What I just said, but probably a
9 little bit better because he's got a PhD.

10 THE COURT: But that was factual testimony, so
11 we're not going to have fact testimony from an expert.

12 MR. SULLIVAN: No, no, no. Just what happens in
13 the industry, that they make these sorts of projections. As
14 we said in our motion to dismiss, this is in the selective
15 prosecution case, our motion, we sort of laid out the
16 industry. This is what literally a ruling that prohibits
17 aggressive pro forma --

18 THE COURT: What does aggressive mean?

19 MR. SULLIVAN: That --

20 THE COURT: Optimistic.

21 MR. SULLIVAN: Optimistic. There you go.
22 Optimistic. It would absolutely turn the industry upside
23 down.

24 THE COURT: All right. Let me give you some
25 preliminary reactions here, although I'm going to think about

1 this more. So I accept the Government's argument that
2 reliance is not an element for criminal securities fraud or
3 wire fraud prosecution, but materiality is, and there's at
4 least some overlap on the Venn diagram there. Materiality is
5 what would a reasonable investor in this space, essentially,
6 think is important and not important.

7 And it is true that when you look at the total mix
8 of information available about a security, the average
9 investor in true startups, Series A endeavors, is
10 prioritizing different variables in the mix of information
11 than somebody who invests in, you know, large cap public
12 equity, right? I don't think that should be controversial,
13 because on the former hand, you have, essentially, an idea
14 and a leadership team on whom you're betting, and on the
15 latter hand, you have a mature developed operation. You
16 know, cash flows are much more reliably predicted, perhaps.

17 All of that does seem like appropriate grounds for
18 an expert to inform the jury, right? Because we're not going
19 to have a jury of venture capital and private equity
20 investors coming in. And I'm guessing you don't disagree
21 with anything I just said.

22 MR. SIEGEL: I don't disagree with the facts that
23 you said or the principles that you said. I disagree that it
24 would be appropriate for an expert to testify about that in
25 this trial. And there's several reasons. One, Your Honor

1 talked about Series A, and there's not going to be any
2 allegations relating to the Series A or the Series B. This
3 all starts at the Series C where there already were cash
4 flows and investors were being told cash flows.

5 But putting that aside, the question of are there
6 things that are more important than revenue or is revenue the
7 most important thing, that's a distinct issue from
8 materiality, because materiality doesn't require it to be the
9 most important thing. It requires it to be one important
10 thing in the total mix of information.

11 THE COURT: Right. But presumably -- I mean, I
12 don't even think I have to presume this. I think what Mr.
13 Sullivan is saying, and correct me if I get this wrong, is
14 that his expert's going to testify -- well, he can't testify
15 that cash flows are immaterial, because materiality is a
16 legal conclusion and usurp the jury's role, let alone mine.
17 But he can testify -- materiality is viewed not subjectively
18 through the lens of what did these actual investors think was
19 important, but objectively, what does a reasonable investor
20 in this setting tend to think?

21 And why can't the defense call someone to say,
22 "Look, the earlier the stage, the more important things like
23 the grand idea, the business plan, the quality of the
24 leadership team, you know, those things matter more at a very
25 early stage than current cash flows do," because you're

1 betting?

2 MR. SIEGEL: So the issue is, with the "more." The
3 law is clear in the Second Circuit that they can call an
4 expert to say, "This is not important and no one investor
5 would consider it important." That is the Litvak 2 case. If
6 they could find an expert who would testify prior revenue and
7 cash flow is not important and no reasonable investor would
8 consider it important, then they could call that person. We
9 would cross them. I think the testimony would be sort of
10 absurd, but they could call that person. That's not the
11 expert they've noticed. The expert they've noticed is to
12 say, "There are lots of things that are important and there
13 are some things that may be important than revenue."

14 THE COURT: Where do you see that?

15 MR. SIEGEL: Well, I don't have their expert notice
16 in front of me, but in the paragraph where it talks about
17 things that are important, there's nowhere where it says that
18 no investor would consider past revenue important. They say
19 that there are other things they consider important.

20 THE COURT: Yeah. I've got to go through this --

21 MR. SULLIVAN: I think that's wise, Your Honor --

22 THE COURT: -- I suppose, more carefully.

23 MR. SULLIVAN: -- because the mix is important.

24 And if the Court reads that, I was very careful in working
25 with Dr. Robinson to draft this to comport with applicable

1 law. But I'll just say Mr. Siegel's understanding of Litvak
2 and it's progeny is overly narrow. There are a mix of
3 factors that people conclude. And in short, the standard for
4 whether an expert should be tendered is if it's something
5 outside the canon of the average juror. And this stuff is
6 clearly outside the canon of an average juror. They don't
7 understand about the notion that investors make bets on
8 people. And I think Your Honor said the team, the management
9 team, the idea all through for early stage investors.

10 And here, we're talking about folks with under \$100
11 million of revenue is generally in the industry considered an
12 early stage startup company, and Dr. Robinson will testify to
13 that. So I mean, the Court might want to take a look at it,
14 but that has to be fair game for the jury to understand this
15 issue of materiality. If the law were that, a statement that
16 is subsequently proved to be false, triggers criminal
17 liability, well, that would be Draconian, and that's not the
18 law, so it has to be material misrepresentation, and then Dr.
19 Robinson will contextualize the industry in a way that can
20 help the jury make a determination as to materiality.

21 THE COURT: Okay. So I mean, I can see immediately
22 in this expert disclosure -- it's actually kind of how the
23 helpful has divided this all by subject matter. Section G
24 goes to the question of selective prosecution, and therefore,
25 I think we've actually even agreed that it should be

1 excluded, but I do now order that it should be excluded. And
2 the same with H, which talks about somebody else who might've
3 done something similar and not been prosecuted for it. I'm
4 reserving judgment on everything, but I think those are the
5 easier questions and others are the harder questions.

6 MR. SIEGEL: And Your Honor, as you go through
7 that, in our reply we do go through each of those paragraphs
8 one by one to explain why we believe that they are not
9 appropriate and why they still don't comply with the Rule 16
10 requirements.

11 THE COURT: How are you prejudiced by the discovery
12 timeline here?

13 MR. SIEGEL: Our argument isn't the timeline. I
14 mean, it's annoying, but it is what it is. In terms of the
15 Rule 16, you know, just for example, I think it's paragraph
16 B, but it's the one labeled "Seeking the Next Apple," he says
17 that his opinion is going to be based on a recent survey of
18 over 800 VC investors. The law is clear that under Rule 16
19 if you're going to be talking about the literature, you
20 actually have to cite the literature and provide the
21 literature.

22 THE COURT: But there were studies cited, and they
23 may fit this description in the expert disclosure that we
24 got, such as it was, right?

25 MR. SULLIVAN: Correct, Your Honor.

1 MR. SIEGEL: I don't know what survey he's
2 referring to or what study he's referring to.

3 THE COURT: I'll tell you right now. It's in the
4 motion to dismiss, which is obviously not a proper venue for
5 disclosing this.

6 MR. SULLIVAN: I believe it's a Harvard Business
7 Review article. I'm pulling the document now, as soon as I
8 get online.

9 MR. SIEGEL: I mean, I guess issue is a motion to
10 dismiss filed last August contains a citation that we're
11 supposed to figure out as to what this expert is talking
12 about, that defeats the purpose of the expert notice, which
13 is supposed to advise us of what completes their opinions and
14 basis.

15 THE COURT: I'm not saying this does or does not
16 constitute adequate disclosure.

17 MR. SULLIVAN: Whereas the Court said earlier --

18 THE COURT: It may well be that it doesn't, but --

19 MR. SULLIVAN: As the Court said earlier --

20 THE COURT: -- footnote 2 --

21 MR. SULLIVAN: -- Jonathan just called me. I'll
22 give it to him.

23 THE COURT: I do think the parties should speak to
24 each other with more frequency. Footnote 2 in the motion to
25 dismiss, there's a sentence in the text, "Nine percent of VC

1 investors admit to using no financial metrics whatsoever, and
2 an even higher percentage admit that they make, quote, 'gut
3 investment decisions,' citing Paul Gompers and other
4 professors, "How Do Venture Capitalists Make Decisions?"
5 This is Harvard Business School study cited at pages 2 and 3.

6 I mean, it will be interesting to me to know. If
7 you're saying, "We might've called an expert of our own had
8 we known that the Court was going to admit expert testimony
9 about surveys like this," the question of whether a real
10 prejudice has obtained or not could inform the extent to
11 which I invoke any delay in my decision to admit or deny
12 expert testimony.

13 MR. SIEGEL: Well, Your Honor, the issue is
14 twofold. I mean, even sitting here today, we don't have a
15 full picture of what this witness would say or the basis for
16 his opinions. And we believe that it's all inadmissible for
17 the reasons we lay out in our motion. Had this been
18 something that we could've seen earlier and we could've had
19 the opportunity to call Mr. Sullivan and say, "Hey. You
20 don't actually provide the basis for his opinions. Can you
21 provide it?", then that would've allowed us to figure out, do
22 we need to call our own expert to rebut this? But right now,
23 we don't know what he's going to say. We don't know the
24 basis of what he's going to say is.

25 THE COURT: But couldn't you have assumed that he

1 was going to say the things that Mr. Sullivan is saying?

2 MR. SIEGEL: But the things that Mr. Sullivan is
3 saying --

4 THE COURT: On pages 5 and 6, "Are focused on the
5 identity of the founders and the business model rather than
6 any real financial information. In the hierarchy of decision
7 making in this particular economic context, the most
8 frequently cited important factor is the identity of the
9 founders themselves. Twenty-six percent of venture capital
10 firms do not even cite the business model."

11 MR. SIEGEL: But Your Honor, I mean, to that
12 particular point -- and then that comes back to the
13 relevancy, and the relevancy of a prejudice. The standard
14 for materiality that are going to be in the jury instructions
15 is that it doesn't have to be determinative. It doesn't have
16 to be the most important. It has to be one thing that
17 substantially affects the total mix.

18 THE COURT: Right. But that's a live jury question
19 here. And if I'm a juror who has never worked in the
20 financial industry, you know, doesn't manage a stock
21 portfolio, and I'm instructed by a federal judge to decide
22 whether given alleged misrepresentations were material or not
23 material, how am I supposed to think about that unless I have
24 some education on the subject of how investors in early stage
25 equity think about the investment decision?

1 MR. SIEGEL: But Your Honor, this issue is what the
2 expert going to say that is actually going to be helpful?

3 THE COURT: The expert's going to say, you know,
4 "This is not anecdotal. I've surveyed hundreds of venture
5 capital investors and asked them in reliable surveys to tell
6 me which factors are more important and which factors are
7 less important in their decision making." And I understand
8 that that doesn't map precisely onto the materiality
9 instructions, but it's something, and I'm going to say that
10 in general, in early stage investing, certain variables tend
11 to be relied on more than others, according to, you know, the
12 self-reporting of the people actually making those investment
13 decisions. So for example, the quality of the management
14 team is generally more important than how much money did you
15 learn last year. Like, you think that should be excluded on
16 relevance grounds?

17 MR. SIEGEL: On relevance and prejudice, because
18 exactly as Your Honor said, it doesn't map on. And so it's
19 answering the question to the --

20 THE COURT: Well, but if it mapped on precisely,
21 then you'd have a different problem, which is the problem is
22 that the expert is usurping the role of the judge and jury in
23 defining the law and applying the law.

24 MR. SIEGEL: But that's not so, Your Honor.
25 Because Litvak 2 is the case that talks about the value of an

1 expert to talk about materiality. And Litvak 2 makes all the
2 points you're making, which are right, but what the expert in
3 Litvak 2 was saying did map on for materiality analysis, and
4 it's quoted in Litvak 2 and it's quoted in our briefs. That
5 expert said, "This is information that no investor would
6 consider important. Here's the reasons it is not important
7 at all." That does answer the materiality question.

8 But just telling someone, "I did a study about
9 what's the most important thing, and revenue's not the most
10 important thing," one, that doesn't actually answer the
11 question, and two, it has the potential to mislead, because
12 it might be that the answer is revenue's the second most
13 important thing or revenue's the third most important thing.
14 But now you're putting the wrong question and you're putting
15 the wrong answer in the jury's mind. So I just want to be
16 very clear, we have no objection --

17 THE COURT: I'm going to give the jury the
18 definition of materiality and we're going to hash that out
19 amongst ourselves beforehand, and we will trust that the jury
20 is capable of understanding and following my instructions.
21 And you will ask that the instruction make clear that lots of
22 factors can be material, even if they're not right number 1
23 or 2 in some hierarchy, and the jury will get that.

24 But again, this does seem to me to be something
25 that's beyond the life experience of the median juror, for

1 sure. And preliminarily, the testimony of an expert that I
2 have talked to a large representative sample of venture
3 capital investors and I find in my research and in reviewing
4 the research in the field, that they tend to prioritize some
5 factors and to deemphasize on a relative basis some other
6 factors, I see that as at least minimally relevant and also
7 inappropriate subject for expert testimony.

8 To the extent the expert's going to testify
9 everybody lies, investors expect people to lie, A, I doubt
10 that's a proper subject for expert testimony, and B, I doubt
11 that's even what the expert's research has shown. And I
12 don't intend, barring some new developments, to hear expert
13 testimony along those lines. And the defense should come to
14 me before arguing that kind of thing in opening arguments.
15 It's incumbent on me to give rulings here, but the reason I'm
16 giving preliminary ruling now is because I don't want to hear
17 about that kind of thing in opening statements until we've
18 had a fuller discussion.

19 MR. SULLIVAN: Just to be clear, what kind of
20 thing?

21 THE COURT: The kind of thing that everybody lies.

22 MR. SULLIVAN: Oh yeah.

23 THE COURT: And investors expect that everybody
24 lies.

25 MR. SULLIVAN: That's not my opening.

1 THE COURT: Okay. That I expect will be out.
2 Here's a taxonomy of sorts of what investors care about more
3 and less. I don't see, as we sit here, basis for excluding
4 that, and so I would expect it to be in, all things being
5 equal. All the selective prosecution stuff is out for the
6 reason that we've talked about, and you know, some of what's
7 in the expert's report, obviously, fits that category. I
8 think that takes us through Romans VI, if I'm using the table
9 of contents in the Government's motions in limine as my
10 agenda here.

11 MR. SIEGEL: Your Honor, two things. One, one of
12 the experts who they semi-noticed in their first letter,
13 they've now informed us that they intend to call a person
14 that's a fact witness to bring that same testimony in.

15 THE COURT: Sorry, what testimony?

16 MR. SIEGEL: So if you may recall, in their
17 original expert letter, they talk about expert number 2, who
18 is an accountant who did a post hoc analysis of --

19 THE COURT: Oh this is the company that was
20 actually earning more revenue?

21 MR. SIEGEL: That's right. They've now said that
22 they're going to call that as a fact witness, not as an
23 expert witness. And our argument, and this is laid out in
24 our reply because we only got it after the motions were
25 filed, is that's still irrelevant for all the reasons that we

1 talked about. And two, it's not appropriate for a fact
2 witness anyway.

3 THE COURT: So this, it feels analogous to the
4 issue that comes up all the time in tax cases, where, you
5 know, the Government says the defendant knows and believes he
6 earned a million dollars in a given year. He reports only
7 \$500,000 in income. Government wants to prosecute this
8 person for tax evasion. Defense hires an expert to say,
9 "Look, this defendant actually had all these deductions
10 available to them, such that \$500,000 was the real number,"
11 but there's no evidence that the defendant actually knew
12 about those deductions or was thinking about them in any way,
13 shape, or form when he reported his income.

14 And the tax content may be distinguishable because
15 of the willfulness requirements, but if you're going to try
16 to prove the defendant's knowledge that his revenue
17 representations were false, knowledge is a true belief,
18 right? Not just a belief that may be true or may not be
19 true. If you're going to say the defendant knew those
20 representations to be false, does that implicate the question
21 of whether the representations actually were false or not?

22 MR. SIEGEL: No, Your Honor. And in part, it's
23 because it's a conspiracy. Factual impossibility is not a
24 defense to conspiracy. Just like you can agree to sell drugs
25 that are not really drugs, you can agree to rob a drug dealer

1 who doesn't exist, and there's plenty of law on that. And
2 there's law in the securities fraud context that directly
3 addresses this. It's Judge Garvey (ph.)'s decision.

4 THE COURT: I got to think about this more. It's
5 not a conspiracy if the thing you're agreeing to do is not
6 actually illegal. Let's say I believe, in my heart of
7 hearts, that we've earned a million dollars this year at this
8 company, and I go to investors and say, "Hey. You should
9 invest. We just earned \$5 million," you're saying if it
10 turns out we actually had -- you know, my head of sales
11 signed a \$5 million contract with somebody that I just didn't
12 know about, I can still be prosecuted for conspiracy to
13 commit securities fraud, because that's what I intended and
14 agreed with others to do, even though the representations I
15 made were, in fact, the truth.

16 MR. SIEGEL: That's right. I mean, it's not this
17 case, but if you agree with someone, if I'm going to go tell
18 investors we made 5 million, even if you never tell those
19 investors, even if that never happens, it's the agreement
20 that's the crime. And the facts of whether you made a
21 million or whether you made 5 million, that's not legal
22 impossibility. That's factual impossibility.

23 THE COURT: Right.

24 MR. SIEGEL: And the law is clear that factual
25 impossibility is not a defense.

1 THE COURT: Okay. What are the facts of this case?
2 Like, what is the basis on which it's going to turn out in
3 the defense view, the revenue projections actually were true?

4 MR. SULLIVAN: So I think I can short-circuit this.
5 We're going to present evidence that, to use Your Honor's
6 phrase, that in Carlos's heart of hearts he understood the
7 revenue to be what he said it is. And the --

8 THE COURT: Understood based on what? Understood
9 it correctly or incorrectly?

10 MR. SULLIVAN: Understood it correctly. And as it
11 turns out, he was --

12 THE COURT: The only person who can testify to
13 what's in his heart of hearts is him, for obvious reason.

14 MR. SULLIVAN: Or we can provide evidence from
15 which a jury can make a reasonable inference, right? I was
16 in a meeting with Mr. Watson and we saw a report where five
17 people were investing a million dollars. Mr. Watson went out
18 and said, "Hey. I've got 5 million."

19 THE COURT: Oh I see.

20 MR. SULLIVAN: Right. So jury clearly can draw an
21 inference from that.

22 THE COURT: All right. So we're not even talking
23 about revenue here. We're talking about capital
24 contributions.

25 MR. SULLIVAN: Capital contributions. Or even

1 revenue, but the point is that --

2 THE COURT: That would go to good faith. If we
3 could just pause there.

4 MR. SIEGEL: So Your Honor --

5 THE COURT: If the defendant's in a meeting where
6 his second in command says, "We have committed investments
7 from the following five people, and then the defendant
8 repeats that to" --

9 MR. SIEGEL: Absolutely, Your Honor. And I want to
10 make sure we're not talking past each other.

11 THE COURT: Yeah. We may have more agreement.

12 MR. SIEGEL: Any evidence of contemporaneous
13 records, contemporaneous discussions, meetings, emails that
14 Mr. Watson got or received, that's fair game if they want to
15 show that. The issue is the post hoc nature of it. It's we
16 hired an accountant after all this happened. That accountant
17 went back and made these calculations, and there's no
18 evidence that those calculations existed at the time.

19 THE COURT: Made what calculations, though? Made
20 what calculations?

21 MR. SIEGEL: So the document that they produced to
22 us is an amended income statement that has different revenue
23 figures than the revenue figures that exist internally at the
24 company at the time.

25 THE COURT: And the amendments are based on what?

1 MR. SIEGEL: Well, that's not clear to us.

2 MR. SULLIVAN: It is based on --

3 THE COURT: Forget about what it's -- what is being
4 amended; top line revenue?

5 MR. SULLIVAN: Oh it's revenue statements. So the
6 Government's star witness, Samir Rao, we are going to contend
7 was a horrible CFO and simply got it wrong. Carlos had the
8 right numbers.

9 THE COURT: Got what wrong, revenue?

10 MR. SULLIVAN: The revenue numbers. Carlos had the
11 right numbers. He had them all along. We're going to
12 produce evidence that shows that he had them right along.
13 And the accountant is going to verify that by saying,
14 "Obviously, yes, the number was X. The number was not Y,"
15 and that that's relevant. That's easy. That goes to his
16 good faith. That goes to his mens rea, with respect to
17 making the statements.

18 THE COURT: So who's the witness? It's an
19 accountant?

20 MR. SULLIVAN: Witness is an accountant.

21 THE COURT: Who was not there at the time?

22 MR. SULLIVAN: Who was not there at the time. Who
23 looked at the books in order to -- and so, essentially, it
24 would be additive evidence --

25 THE COURT: But how does that witness know what Mr.

1 Watson knew or didn't know?

2 MR. SULLIVAN: A brick is not a wall. Don't be
3 overly philosophical here, but famous statement from Whitmore
4 (ph.). Probably the most famous evidence professor of all
5 time. And he says relevant evidence is like a brick. The
6 whole story is like a wall. A brick is not a wall. And just
7 one piece of evidence that tends to shift the probabilities
8 of some fact of consequence to the case that --

9 THE COURT: Then it's post hoc expert analysis.

10 MR. SULLIVAN: It's post hoc, but it verifies
11 what --

12 THE COURT: I really need you to give me an example
13 of what the former CFO's mistakes of fact were. He was lazy
14 and the head of sales came to him and said, "We've got a
15 signed contract here that should be recognized as revenue in
16 this year," and the CFO just lost the contract and didn't
17 count it in revenues?

18 MR. SULLIVAN: That's one of them.

19 THE COURT: Really?

20 MR. SULLIVAN: Not necessarily lost, but
21 absolutely, simply did not understand how to account for
22 certain aspects in the media space. Just didn't understand
23 it.

24 THE COURT: Are we going to have testimony about
25 revenue recognition and how gap works on this point or not?

1 MR. SULLIVAN: Oh my goodness. I'm going to
2 cross-examine them on it. You know, he's here trying to put
3 Carlos in jail for 37 years. He's wrong. He absolutely did
4 not include all the numbers that were available to everyone.
5 And so --

6 THE COURT: Well, that can be --

7 MR. SULLIVAN: So Your Honor, I just got this
8 specific number. There were double digit contracts -- I'm
9 giving away my whole case, that Mr. Rao simply did not
10 include. Just didn't include.

11 THE COURT: Double digit signed contracts or
12 contracts that were being negotiated?

13 MR. SULLIVAN: Yes.

14 THE COURT: It was not a yes or no question.
15 Double digit contracts that were actually executed or that
16 were still being negotiated?

17 MR. SULLIVAN: I thought you said signed contracts.
18 That's why I was saying yes to the signed contracts, that
19 some of them actually were signed contracts. Some were
20 negotiated. The point here is that he got it wrong, and on
21 cross-examination I'm going to show that he got it wrong.

22 THE COURT: So let me paraphrase your argument to
23 the Government and put them to answer it. If I understand
24 this correctly, you're going to say the defendant made
25 certain misstatements in respect of accounting metrics,

1 things like revenue in a given year. That obviously puts in
2 question A, what we mean when we say the word revenue, and B,
3 how much revenue OZY had truly earned in a given year.

4 And the CFO's, you know, internal financials are
5 not the God-given truth on that subject. They're the CFO's
6 financials. If Mr. Watson is seeing those financials that
7 his CFO is compiling, that's obviously relevant to what Mr.
8 Watson knows and believes, and you should be able to put
9 those internal financials in. But to the extent Mr. Watson
10 genuinely believes in good faith that the company has earned
11 more revenue than his CFO seems to think, then he should be
12 able to mount a good faith defense on that front, or just
13 argue his lack of intent to begin with.

14 And so to me, if I was on the jury and I was not an
15 accountant, which as it happens, I'm not, I would want to
16 know what do we mean when we say the word revenue? Do you
17 need to have two signatures on a written contract before you
18 can truthfully say, "We've earned these revenues"? Or is it
19 enough that you have a handshake? I don't know. What does
20 gap have to say about that?

21 And maybe this is expert testimony and they've got
22 disclosure problems or otherwise, but put that aside for the
23 moment. Why wouldn't that be a proper subject for an
24 accountant to come in and testify about, that look, the CFO
25 seemed to think he didn't recognize this contract as revenue

1 because, you know, he lost it in his desk or it didn't have a
2 second signature or whatever, but the accounting rules don't
3 require that. You know, the accounting rules say a handshake
4 is enough, which I doubt the accounting rules say, but just
5 assume that for now.

6 MR. SIEGEL: Sure. So the premise of that is that
7 there's some evidence that Mr. Watson was aware that this
8 handshake contract existed.

9 THE COURT: Yeah. There's got to be a factual
10 predicate. I agree with that. And certain bricks have to
11 come in before certain other bricks become relevant.

12 MR. SIEGEL: But that's the issue that we're
13 drilling down on. Putting aside the question -- and I think
14 you're right --

15 THE COURT: I think we all agree on that. Like, if
16 I can just pause you for a second there, Mr. Sullivan is
17 going to tell me now that he agrees that this accountant's
18 testimony about -- you know, if it's going to Mr. Watson's
19 good faith belief, obviously, there has to be a foundation
20 laid for the idea that this is information Mr. Watson knew.
21 But I think that Mr. Sullivan has actually already told us
22 that that's the case. Is that --

23 MR. SULLIVAN: Absolutely, Your Honor. And just to
24 beef up the factual predicate, in addition to contracts,
25 there are at least two other bases where we think Mr. Rao has

1 made significant accounting mistakes, which --

2 THE COURT: On what line item?

3 MR. SULLIVAN: Well, one, he conflated the accrual
4 basis of accounting with cash basis of accounting, so that
5 produced some weird numbers.

6 THE COURT: Timing shifts.

7 MR. SULLIVAN: But the actual numbers were in
8 Carlos's head, because he was the big picture guy, so I mean,
9 he knew what these numbers were. And there's at least one
10 other basis. So in addition to just out and out missed
11 contracts, some signed, some not, there was a lot of revenue
12 floating around, of which Mr. Watson was aware.

13 THE COURT: What's the cash flow versus accrual
14 thing? You were going to say he should've been entitled to
15 recognize revenues.

16 MR. SULLIVAN: Well, you got to choose one. On an
17 accrual basis, if that's what you're using, but you can't
18 sort of go back and forth.

19 THE COURT: And the CFO was saying, "I'm not going
20 to recognize anything until the cash comes in the door," even
21 though there's a contractual commitment to pay those --

22 MR. SULLIVAN: Correct. Correct. I mean, both are
23 appropriate methods of accounting, but you can't --

24 THE COURT: Because I understand the accounting
25 rules, which I really don't, I think one thing I might know

1 is that you're either on the cash method or you're on the
2 accrual method. You can't be on both as you see fit at one
3 given time. I think you should treat this person as an
4 expert, since from what I hear, the only thing they're
5 adding -- you're not going to talk to Mr. Watson's knowledge.

6 You're going to have to get that in through other
7 sources. What this accountant is going to say is, "Here's
8 how the accounting rules ought to have been applied," and
9 that sounds to me like classic expert testimony that may be
10 excludable for Rule 16 violations having occurred, but I
11 haven't decided that yet, so I think it's incumbent on you to
12 get the Government as clear, concise, and explicit a
13 statement of what this person's going to say as soon as
14 humanly possible.

15 MR. SULLIVAN: Fair enough, Your Honor. Let me
16 just tell you what I was thinking when I changed it over to a
17 fact witness, is because he was dealing with the company's
18 actual numbers.

19 THE COURT: Yeah, but he's making accounting
20 judgments.

21 MR. SULLIVAN: But that's fine. On the notice
22 requirement, just to remind the Court, because of the
23 California litigation, as I advised the Court, Mr. Watson
24 simply -- all of his funds were stopped and couldn't retain
25 an investor.

1 THE COURT: That's not a good basis for
2 overcoming --

3 MR. SULLIVAN: Well, it's a Sixth Amendment
4 question, but what Your Honor said was to write a letter,
5 which I did, so that was (indiscernible) --

6 THE COURT: Yeah, I think I keep saying the same
7 thing, though, which is, I'm not telling you that it's okay
8 to omit whatever the Government is saying needs to be
9 included. I'm just telling you whatever you can say, say it
10 as soon as possible. That's not a safe harbor.

11 MR. SULLIVAN: No. It's not. And I'll just say,
12 then, if the Court finds a Rule 16 violation, I'm in effect
13 of under the Sixth Amendment, so want to put that on the
14 record. But we'll get it as fast as we can.

15 MR. SIEGEL: But Your Honor, I mean, now this gets
16 into the prejudice issue that you asked about before.

17 THE COURT: It's all premature. Yeah. Let's
18 understand what it is this accountant would say, and then we
19 can decide A, is this so late that the Government's been
20 prejudiced? B, is this appropriate subject matter for an
21 expert's testimony to begin with? Right now we're just kind
22 of grasping at straws.

23 MR. SULLIVAN: Fair enough.

24 THE COURT: Okay.

25 MR. SIEGEL: And Your Honor, I don't know that you

1 addressed Roman numeral II.

2 THE COURT: That goes to selective prosecution.

3 You know, obviously --

4 MR. SULLIVAN: Not necessarily, Your Honor. Just
5 briefly, part of the founding story of OZY Media, and Ms.
6 Frison may want to speak to that, does have to do with Mr.
7 Watson's race. It was the absence in a particular space of
8 anyone of color to have a media platform. It's why he
9 founded OZY. And to the extent he decides to testify, or to
10 the extent people talk about the founding of OZY, that would
11 be odd and weird and strange to not mention that.

12 "As an African American man, I saw that there were
13 no media spaces where people looked like me." This is why he
14 founded OZY. I'm not trying to relitigate the selective
15 prosecution issue. The Government seems really worked up
16 about that. And I will say to the Government, I'll say to
17 the Court, I understand where that line is. I'm not
18 litigating selective prosecution, but to erase race, to
19 deracinate that issue is an extraordinary --

20 THE COURT: Here's how I see what you're talking
21 about. You know --

22 MR. SULLIVAN: Crediting a witness.

23 THE COURT: -- when a defendant takes the stand, it
24 is, I think, almost a universal custom that that person's
25 going to tell their life story in brief. You know, it may be

1 that where somebody went to college is not technically
2 relevant under Rule 401, but the introduction is the
3 introduction. If he wants to say, you know, a couple
4 sentences on why he decided to leave cable news, if I'm
5 understanding his career trajectory correctly, and start his
6 own new media company, I think that's well within bounds.

7 MR. SIEGEL: Yeah. We have no objection to what
8 Professor Sullivan just described.

9 THE COURT: Okay.

10 MR. SULLIVAN: And there are also investors who
11 said, "We want to invest in Black-owned companies." That is
12 a fee, and is Your Honor going to issue an order to say you
13 can't say the word Black?

14 MR. SIEGEL: We have no objection to that either.
15 If that's what all we're talking about, then that's fine.

16 MR. SULLIVAN: So what I'm not talking about is the
17 selective prosecution arguments. And what I am talking about
18 are (indiscernible) --

19 THE COURT: I mean, there's a limit obviously to
20 relevance. I take it you're not saying that that's relevant
21 to materiality, although maybe -- no. Because materiality is
22 an objective test, not a subjective test, and so the fact
23 that one investor said, "Look, I was looking for companies
24 founded by, you know, minority founders," you know, again,
25 the one sentence is fine, but we're not going to confuse the

1 jury about how materiality works by suggesting that that
2 somehow, you know, is relevant to their consideration of the
3 mix of information available in connection with the
4 investment decision. Like, I think we all know where the --

5 MR. SULLIVAN: Where the line is.

6 THE COURT: -- land mines lie here. Yeah. And so
7 we have agreement on that subject.

8 MS. FRISON: Your Honor, may I be heard? Briefly
9 on that same point, I think there will also be some testimony
10 that will flow from all the witnesses, witnesses on both
11 sides about the difficulties that a Black founder has in
12 raising money in this environment.

13 THE COURT: Why is that relevant?

14 MS. FRISON: I think that even Mr. Rao will be
15 actually discussing, okay, what were the barriers to raising
16 money generally? How do you do that in this space and what
17 problems did OZY have in particular with raising money
18 anyway? So the whole story and the context necessarily
19 includes some discussion of race, I mean, even by the
20 Government's witnesses. This is going to be a part of the
21 reason we had such a hard time raising money aside from any
22 communication --

23 THE COURT: But what's the relevance? Assume
24 that's 100 percent true, what is the relevance of that to the
25 elements of securities fraud or wire fraud?

1 MS. FRISON: It wouldn't be offered, or it wouldn't
2 be elicited, because it is proving or disproving an element.
3 But as we have discussed the context of this industry, that
4 is a part of the context. So this may not even be something
5 that is -- this is going to come out. It has already come
6 out, that this is a part of this industry. So it's not
7 something that's --

8 THE COURT: I'm not seeing the relevance.

9 MS. FRISON: There's a whole -- I'm sorry.

10 THE COURT: And I'm not seeing the relevance, and
11 I'm telling you I don't think it's relevant.

12 MS. FRISON: So if Mr. Rao is asked on the witness
13 stand, "What were some of the difficulties you had in raising
14 money for OZY Media," and he lists that as one of the many
15 difficulties you would have with a startup company, is that
16 evidence coming from him or any other witness who sort of,
17 obviously, know it and would say it, is that going to be,
18 then, stricken or excluded from the jurors' consideration?

19 THE COURT: Why is it relevant? You know, what's
20 relevant here is who did what when.

21 MS. FRISON: But if Your Honor has already opined
22 and discussed the fact that, sure, some context. This is,
23 after all, a story, and it's a story about human beings. So
24 it's not just, we're putting these numbers in front of the
25 jury, you decide if the numbers are correct or not.

1 THE COURT: Because --

2 MS. FRISON: We've discussed that the --

3 THE COURT: -- the baseline proposition is that the
4 law is the law and, you know, what we're having a trial about
5 is whether the law applied to the facts of this case shows
6 that the Government has carried its burden or has not carried
7 its burden beyond a reasonable doubt. And you know, I'll
8 hear the question, but this sounds like a pretty sizable
9 detour from what's actually at issue in this case, and, you
10 know, one that has the possibility to suggest, you know, the
11 kinds of basis for a decision that Rule 403 tells us are not
12 valid bases for a decision.

13 MS. FRISON: Well, the introduction of that
14 information, or how it will come out, would not be what Your
15 Honor is calling a detour, that we're attempting to distract
16 the jury and go over here with information. But it would be
17 akin to someone asking, as Mr. Sullivan said, if an investor
18 is asked, "Why did you invest in OZY?" or "What went into
19 your thought process of investing in OZY?", and one of the
20 reasons is, "I wanted to invest in a Black founder, a Black
21 media company, specifically, and I was looking for
22 minority-owned businesses."

23 I don't think it's right that that's a third rail
24 that witnesses can't touch and the lawyers in the room can't
25 touch, because it is literally about race. It doesn't mean

1 then I take that thread and do a whole half hour with that
2 person, or a half day.

3 THE COURT: Yeah. Look, I can put specifics to
4 this if it will help. I think if the question is put to an
5 investor, "Why did you decide to invest in OZY?", and there's
6 an objection to that question, that objection will be
7 overruled. To the extent there are a long series of
8 follow-up questions about the extent to which somebody's skin
9 color did or did not play into the investment decision, I
10 think we get at least closer to, if not over the line of,
11 Rule 403. And you know, we'll probably take that question up
12 as it goes.

13 Same with Mr. Rao or Rayo, however you pronounce
14 his name, if he's asked, you know, "What were some of the
15 challenges that this company faced in raising money?",
16 probably going to let that question be answered, depending on
17 the context, but again, if we're talking about a focused
18 effort to put, you know, race front and center, that's not
19 going to happen.

20 MS. FRISON: Certainly. And I think that this is
21 more so not for defense strategy purposes, but for our use in
22 knowing what the witnesses are even allowed to say. Again,
23 I'm trying to make sure that the rulings aren't meant to say
24 race cannot be mentioned by any witness. Because it is
25 simply a fact that it is part of this case. It is a part of

1 the difficulties OZY had. It is something that was discussed
2 between the CFO and Mr. Watson.

3 THE COURT: But it's not legally relevant. I mean,
4 let's just say, hypothetically, that you had an investor who
5 was willing to say, "I wanted to invest in a, you know,
6 business with a certain founder's profile, and I did not care
7 about how my investment would do. I didn't care about
8 profit. I didn't care if I lost the whole thing. I didn't
9 care if they lied to me in every single word they said about
10 the basis for investment," that's not how the materiality
11 standard works, because it's objective rather than
12 subjective.

13 And so I disagree with you. I want to be very
14 clear about this. I don't think an individual investor's
15 views concerning the importance of skin color are going to be
16 relevant. It may be that to the extent we have individual
17 investors talking about their investment process, it becomes
18 relevant because it was, in fact, part of their investment
19 process, but we're all going to bear in mind the distinction
20 between objective analyses and subjective, and, you know,
21 we'll take the objections as they come. But I hope I'm being
22 clear that I do view all of what we're talking about here as
23 relevant on background in a very passing way, and legally
24 relevant, you know, generally not at all, and we'll take the
25 possible exceptions to that up as we find them.

1 All right. The coconspirator statements I will
2 reserve judgment on, but I think the parties should expect
3 that those will be admissible against both defendants.

4 MR. SIEGEL: And Your Honor, in addition to the
5 coconspirators, there's the employees and agents of OZY that
6 we also moved would be admissible against both defendants
7 that I don't understand the defense to be objecting to.

8 THE COURT: Which employees?

9 MR. SIEGEL: Well, there will be a number of them.
10 Former accountants who worked at OZY, a former CFO.

11 THE COURT: And the reason is they're statements by
12 a party opponents?

13 MR. SIEGEL: They're statements of a party
14 opponent, and that they're all agents of both OZY and Mr.
15 Watson.

16 THE COURT: Why are they Mr. Watson's agents
17 personally?

18 MR. SIEGEL: So the law in the Second Circuit, and
19 we cited the Second Circuit in district court cases on this,
20 is that where you have a single person who is the ultimate
21 decision maker at a company, who owns the company and leads
22 the company, then that company's officers and employees are
23 also that person's agents.

24 THE COURT: Okay. Tell me where in your table of
25 contents we see the employees' statements.

1 MR. SIEGEL: Sure. Just one moment.

2 (Pause)

3 MR. SIEGEL: It's on page 32, and that section
4 discusses both Samir Rao and Susie Han, who are two
5 particular employees, but then also discusses employees
6 generally.

7 THE COURT: Does this language from the Roo (ph.)
8 case about the employees being answerable and directly
9 responsible to the defendant, does that limit the universe of
10 employees that you're talking about here?

11 MR. SIEGEL: No. And if you look at the Zakin
12 (ph.) case and the In re Reserve Fund, where it talks about
13 in the reserve fund language, the declarant is the ultimate
14 supervisor, not the direct supervisor.

15 THE COURT: What's the theory?

16 MR. SIEGEL: The theory is that these people worked
17 for Mr. Watson.

18 THE COURT: Personally?

19 MR. SIEGEL: He was their boss. He controlled the
20 company. He was a majority owner of the company. Those are
21 the factors that are set forth in those cases.

22 THE COURT: I mean, what I would've thought was
23 you're trying to admit these statements as statements of a
24 party opponent, and that extends not only to the party
25 opponent, him or her or itself, but also to its agents or his

1 agents.

2 MR. SIEGEL: That's right.

3 THE COURT: And the standard in the Roo case that
4 says, "Were answerable and directly responsible to the
5 defendant," kind of picks up the law of agency, right? It
6 shows an ability to control. I guess you're saying --

7 MR. SIEGEL: The Zakin case says that, "Where the
8 CEO was the company's principal owner, directed its
9 operations, and ultimately made all the final decisions."
10 That very much describes Mr. Watson at OZY.

11 THE COURT: So all we're talking about right now is
12 the hearsay component. You're saying the statement of every
13 employee of OZY Media is admissible over a hearsay objection
14 as the statement of a party opponent.

15 MR. SIEGEL: If it's within the scope and relates
16 to the their agency relationship.

17 THE COURT: Within the scope of their employment.
18 Yeah. But you're still going to have the relevance issue --

19 MR. SIEGEL: Absolutely.

20 THE COURT: -- of if there's no evidence that Mr.
21 Watson knew or heard any of this stuff, then it's not coming
22 in, right? Can you give me an example of what we're talking
23 about here?

24 MR. SIEGEL: Yeah. So I mean, one is going to be
25 the statement from the CFO, which is going to be in the next

1 Roman numeral that we're going to get to. Statements where
2 the internal finance team is talking about, "Here are our
3 numbers for the month."

4 THE COURT: Is Mr. Watson there?

5 MR. SIEGEL: And then that'll be accompanied by
6 testimony of, "This is a record of what our numbers were, and
7 we discussed that Mr. Watson all the time." So it's the
8 hearsay objection to get in, like, this is what the numbers
9 were at the time, but in order for it to be relevant, as Your
10 Honor put your finger on, it'll need to be accompanied by,
11 "Yes. And of course we talked about that with Mr. Watson."

12 THE COURT: Yeah. I think we have agreement on
13 that. Okay. So that is --

14 MR. SULLIVAN: I'll just point out briefly, Your
15 Honor, if I may, two issues, and we have it in our brief.
16 One, the attenuation issue.

17 THE COURT: Yeah. Which goes to relevance.

18 MR. SULLIVAN: Yes. And that's our big issue,
19 which I think much of what they might want to enter is not
20 going to be relevant, and I think that's a game-time
21 decision. You know, a random, you know, person who's been
22 there two weeks, fresh out of high school, at some point it's
23 both attenuated and irrelevant. Unless there's some evidence
24 that that person was in conversation with Mr. Watson or had
25 some kind of authority within the organization, then it

1 really becomes problematic. So it's a relevance question,
2 potentially a 403 question. But I think it's a game-time
3 decision.

4 THE COURT: Well, we just heard it's going to be a
5 witness who can say, "This is the kind of financial
6 information we talked about with Mr. Watson all the time."

7 MR. SULLIVAN: If they have the right witness, then
8 we'll cross-examine. If it's Rao, obviously. But you can go
9 so far down the line that it becomes irrelevant. That's our
10 only point. And the general proposition the law stated
11 correctly, but the devil's in the details.

12 MR. SIEGEL: So Your Honor, I guess the -- let's
13 try and concretize this. I mean, the example that I'm
14 thinking of is, there's an email from OZY's accounting
15 manager to OZY's outside accountants, saying, "Here's our
16 financial statement for the year." We want to admit that to
17 show that that's what was in OZY's books at the time. We'd
18 say that's not hearsay because that is a statement by an
19 agent of the company and Mr. Watson about what was in OZY's
20 books at the time.

21 In terms of the relevance, we'll have a witness
22 says, "I don't remember what was in the books at the time.
23 If this is what was in the books at the time, that's fine,
24 but whatever was in the books, we talked about that with Mr.
25 Watson all the time."

1 MR. SULLIVAN: So the concretized example, at first
2 blush, that might be admissible against OZY. If they
3 produced evidence that they talked to Mr. Watson, then we'll
4 deal with that on cross-examination. Absent that sort of
5 evidence that Mr. Watson even knew what they were doing, I
6 don't see how that's admissible against Mr. Watson. Maybe
7 OZY.

8 THE COURT: Well, the question is, what's an
9 adequate foundation, right?

10 MR. SULLIVAN: Correct.

11 THE COURT: And there are at least two choices,
12 where choice one is the witness who's testifying can say, "I
13 talked about this particular number in this particular email
14 with Mr. Watson at this time." Choice two is, "I don't
15 remember what we said on that day, but we had a habit, a
16 pattern and practice, if you will, of discussing current
17 revenue."

18 You know, it's not going to come as a surprise to
19 anybody that one of the big questions on a CEO's mind is how
20 are we doing this quarter or this year, in terms of money
21 coming in and money going out. Is it a sufficient foundation
22 to say, "This is the kind of stuff we were talking about all
23 the time"?

24 MR. SULLIVAN: I agree with the Court's analysis.
25 And particularly the part about custom and practice or habit,

1 absolutely right.

2 THE COURT: So we may have no dispute on this
3 stuff.

4 MR. SULLIVAN: Custom and practice, very important
5 in this industry.

6 THE COURT: Okay. Is item 8 disputed, that the
7 Government should be permitted to authenticate documents
8 based on their production, by either defendant in response to
9 subpoenas? I do want to not waste the jury's time.

10 MR. SULLIVAN: Which one is this?

11 THE COURT: This is Roman VIII in the Government's
12 table of contents.

13 MR. SIEGEL: Having spoken to Mr. Sullivan, I
14 understand there's going to be a stipulation about that,
15 unless has changed, but that's what we were told.

16 THE COURT: Yeah. This does seem to be the kind of
17 thing on which reasonable minds should prevail. And it would
18 not be a good use, in my view, of the jury's time for us to
19 have hours of authenticity of foundation on this.

20 MR. SULLIVAN: Agreed. We agreed on that, Your
21 Honor.

22 THE COURT: Item 9, is that disputed? Roman IX?

23 MR. SULLIVAN: Brief indulgence, Your Honor.

24 THE COURT: Please.

25 (Pause)

1 MR. SULLIVAN: I think similar to the others, if a
2 proper foundation is laid, we'll make objections as
3 appropriate. At least I'll make objections as to Mr. Watson.
4 So I don't know what sort of foundation the Government plans
5 to lay.

6 THE COURT: The Government describes the foundation
7 in the lead up to the excerpt on page 41. Assume that that's
8 the context. Do you object to this email coming in? And if
9 so, on what basis?

10 MR. SULLIVAN: For what purpose? I guess that
11 would be the --

12 THE COURT: I would imagine it's to show knowledge
13 and intent to their fraud. You got a CFO who said, "I'm not
14 doing this."

15 MR. SULLIVAN: Right.

16 THE COURT: "It's a lie." And the defendant did it
17 anyway.

18 MR. SULLIVAN: So as stated, I do not think this is
19 a sufficient foundation. However, were the Government to lay
20 a sufficient foundation, then I think it becomes a question
21 of weight, not admissibility, and we would deal with it
22 thusly.

23 THE COURT: What's insufficient about the
24 foundation?

25 MR. SULLIVAN: That it doesn't go to Mr. Watson's

1 mens rea at the time. This is a context note that was
2 written well after the fact, and in context, a note that
3 initially presumed Mr. Watson did not know anything about
4 this. So I don't think the Government's going to be able to
5 lay that foundation.

6 THE COURT: Yeah. I mean, I think some of the
7 weight of this question rests on the phrase, "after the
8 then-CFO refused."

9 MR. SULLIVAN: Yeah.

10 THE COURT: I think the foundation questions are to
11 whom did the then-CFO direct his or her refusal. Did he or
12 she say it directly to Watson or to some other person? And
13 you know, perhaps, what did the then-CFO say about the reason
14 or the refusal?

15 MR. SIEGEL: Sure.

16 THE COURT: I presume you're going to say it was
17 communicated directly to Watson, and the reason was, "I'm not
18 doing this because it's a lie." And to me, that would be a
19 sufficient foundation.

20 MR. SIEGEL: The testimony is going to be that Mr.
21 Watson asked the then-CFO to prepare a fake contract. The
22 then-CFO said, "No. I will not do that."

23 THE COURT: Said that to whom?

24 MR. SIEGEL: Mr. Watson.

25 THE COURT: Okay.

1 MR. SIEGEL: Within a matter of days, Mr. Rao sent
2 out a fake contract, copying the CFO. The CFO forwarded that
3 to Mr. Watson, said, "Why did you do this? This is a lie.
4 How could you put me at risk? I told you I wouldn't do
5 this," and then resigned. And what that goes to -- and this
6 is in 2019. The fact that Mr. Watson is, at a minimum, put
7 on notice that Mr. Rao was sending out fake contracts in
8 2019 --

9 THE COURT: And continues to for some period of
10 time?

11 MR. SIEGEL: And continues for the next year and a
12 half, working with Mr. Rao, at which time Mr. Rao's testimony
13 will be that Mr. Watson was in on it the entire time. This
14 supports that, that the reason Mr. Watson had no reaction or
15 no negative reaction to this is because he was fully aware of
16 it, and in fact, had directed the sending of the fake
17 contract.

18 THE COURT: Yeah. Seems eminently adequate as a
19 foundation to me.

20 MR. SULLIVAN: If that's the testimony of the
21 witness, that certainly meets foundational requirements.
22 It's untrue, and I think the Government owes us some Brady
23 based on that witness's statement, but that's what
24 cross-examination is for.

25 THE COURT: Okay.

1 MR. SULLIVAN: And I'll just point out that, you
2 know, if the Government is sponsoring a witness, the
3 Government ought to be sure that it is familiar with all of
4 the witnesses' statements, if they're going to sponsor that
5 testimony. But as articulated, yeah, that could be a
6 foundation. It builds an inference on an inference, but
7 weight, not admissibility.

8 THE COURT: Okay. The Government should be
9 permitted to introduce contemporaneous statements by victims.
10 This looks like it's maybe tied up with Roman XII, maybe not.
11 Are X and XII the same thing; or related subjects?

12 MR. SIEGEL: They're related, but examples of this
13 are what specifically Mr. Watson was telling them, so there's
14 some oral conversations that Mr. Watson has with investors.
15 You know, there's one particular event where we talk about in
16 our motion. Mr. Watson calls the investor and says that this
17 is what happened. That investor immediately sends a voice
18 memo to his colleague saying, "I just got off the phone with
19 Mr. Watson. This is what he told me." We're saying that
20 that's admissible as a present-sense impression, because it's
21 basically contemporaneous with what Mr. Watson told him.

22 THE COURT: Oh I see. Present-sense impression.

23 MR. SULLIVAN: Well, that's wrong. Present-sense
24 impression is not basically. It's present sense, not right
25 after. That's just wrong as a matter of law.

1 THE COURT: Well, there's the substantially
2 contemporaneous requirement, so that would be the foundation,
3 right, of how substantially contemporaneous -- what if
4 somebody writes the email 48 hours later?

5 MR. SIEGEL: That would not be a present-sense
6 impression.

7 THE COURT: Okay.

8 MR. SULLIVAN: So it depends on when.

9 MR. SIEGEL: It has to be substantially
10 contemporaneous.

11 THE COURT: Which means what in this case? Like,
12 are we going to fight over the delay?

13 MR. SIEGEL: I would think it would need to be
14 within a matter of minutes.

15 THE COURT: And your witnesses will say that?

16 MR. SIEGEL: Yes.

17 THE COURT: What if they get off the phone with Mr.
18 Watson, they get another call immediately thereafter, and
19 they don't end up writing the email, you know, for four more
20 hours?

21 MR. SIEGEL: The foundation that we're going to lay
22 is, "I got off the phone and I sent this memo."

23 THE COURT: Okay.

24 MR. SULLIVAN: We shall see.

25 MR. SIEGEL: And similarly, we have text messages

1 sent by employees during the call, during the impersonation
2 call, where they're describing what is happening on the call
3 as it's happening.

4 THE COURT: Okay. Number 11, just walk me through
5 the other-acts evidence.

6 MR. SIEGEL: So there's two buckets here. One is
7 going to be at all within the conspiracy, in between the
8 conspirators that are not specifically alleged in the
9 indictment. I don't think there's an objection to that, but
10 obviously, the defense will correct me if I'm wrong.

11 Then there's other interactions with other
12 employees who are not part of the conspiracy. But for
13 example, where Mr. Watson tells an employee, "If you want to
14 win, you have to lie," we submit that that goes to Mr.
15 Watson's state of mind and intent and motive.

16 THE COURT: That's not an other-act at all. It's
17 just a statement.

18 MR. SULLIVAN: It's a statement. I'm sorry, Your
19 Honor.

20 MR. SIEGEL: But it's statements of him telling
21 people to lie. That is an act of him instructing other
22 people to lie. It's not hearsay. It's something he said.
23 We think it's admissible, and maybe you're looking at me
24 because you think it's obviously admissible, but we just
25 wanted to flag it and didn't want to have to deal with it at

1 trial

2 MR. SULLIVAN: It's not admissible as conduct.
3 Counsel said something about conduct, instructing people to
4 lie. It's a statement by a party opponent, and that's a
5 statement. They can ask the jury to draw an inference, but
6 if they're going to say -- I'm not sure I understood what he
7 said, that that means I'm telling you to lie. Well, no. The
8 statement means exactly what it says. We're going to dispute
9 that he said it.

10 I mean, they can argue inferences, but if they're
11 saying -- he said the word conduct, and to my mind, assertive
12 conduct comes up, like a contract exception to a hearsay
13 rule, contract rules assertive conduct. And maybe that was
14 just an errant word, but if they're admitting on the basis of
15 statement of a party opponent, we have no objection. But if
16 it's 404(b) evidence, I don't see it.

17 THE COURT: But there are two levels we're thinking
18 about this. I don't think it's 404(b) evidence. I think
19 there's a potential hearsay objection, which is overcome by
20 the party opponent status, and then there's just the usual
21 kind of relevance and prejudice versus probative value. And
22 from what you're saying, I'm imagining a scenario, like, you
23 know, Mr. Watson and some colleague, who the Government does
24 not allege has any role in the conspiracy, are watching CNBC
25 as the Elizabeth Holmes cases being reported, and Mr. Watson

1 says to that person, you know, "If you want to launch a
2 successful company, you have to lie to investors."

3 MR. SIEGEL: That's not quite right.

4 THE COURT: I'm making this up.

5 MR. SIEGEL: No. I mean, OZY had an event called
6 OZY Fest. They had people who came to speak at it, and based
7 on who was speaking at it, they sold tickets and they sold
8 sponsorships. A former employee would testify, "Mr. Watson
9 told me to lie about who was coming to OZY Fest, and when I
10 protested, he said, 'If you want to succeed, you have to
11 lie.'" So that's not conduct directly in furtherance of the
12 conspiracy, because the conspiracy is about lying to
13 investors and lenders.

14 THE COURT: Is there an objection? And if so,
15 what?

16 MR. SULLIVAN: If it's statement by a party
17 opponent -- but he puts this in 404(b), as I understand it,
18 category. So if the statement gets party opponent, then I
19 don't have an objection. Mr. Watson didn't make that
20 statement, and I'll cross-examine the person. I just don't
21 get the conduct here, bad acts, unless --

22 MR. SIEGEL: If there's no objection, then we're
23 good.

24 THE COURT: Okay. Moving on.

25 MR. SULLIVAN: Well, Your Honor, as long as the

1 Government's not going to try to argue some kind of bad act
2 under 404(b) --

3 THE COURT: I don't think it's 404(b) evidence, and
4 if it were, it would be the kind of 404(b) evidence that it
5 seems necessary to complete the story of the crime on trial.
6 To me, this is more a question of -- the jury might have a
7 legitimate question of, is that part of the conspiracy? Is
8 that not part of the conspiracy? What is the Government
9 telling me here? And you know, that's just for the parties
10 to argue about and the jury to make their decisions.

11 MR. SIEGEL: And then, Your Honor, on the third
12 bucket, and what the evidence about the conspiracy will show
13 is that part of the way Mr. Watson directed and controlled
14 the conspirators was yelling at them, demeaning them,
15 threatening them. And we expect testimony from other
16 witnesses at OZY that that was his management style and
17 that's how he ran the company, which we view as just
18 corroboration when there's testimony about that's what he did
19 to the conspirators and that's how he controlled them,
20 testimony that that's how he ran the company, that's how he
21 controlled everybody, is relevant.

22 THE COURT: So there's a relevant use of that and
23 there's an irrelevant and possibly prejudicial use of that,
24 right? The relevant use of that is the jury may have
25 legitimate questions about, okay, why was this other person

1 doing what they did if they weren't necessarily directly
2 benefiting financially from this fraud or whatever. And so
3 it explains, you know, why the allegedly criminal conduct
4 actually occurred.

5 But there's also the obvious risk that, you know,
6 if the jury just concludes, like, this person was mean to his
7 subordinates, that that provokes or could tend to provoke an
8 emotional reaction to the evidence rather than a logical one.
9 And so we're going to be careful about both the extent to
10 which this information comes in and the context, and, you
11 know, the uses for which it's elicited, to make sure that we
12 stay solely within the first universe and not in the second
13 one.

14 MR. SIEGEL: Understood and agreed.

15 THE COURT: Anything else to say about that?

16 MR. SULLIVAN: We definitely would have a 403
17 objection. There may be foundational objections, depending
18 on what the witness says, but --

19 THE COURT: Do you want a --

20 MR. SULLIVAN: I'm sorry?

21 THE COURT: Do you want a limiting instruction at
22 the time that it's not a crime to be a tough boss?

23 MR. SULLIVAN: Yeah. I probably will ask for a
24 limiting instruction on that.

25 MR. SIEGEL: No objection to that.

1 THE COURT: We'll see. All right. Roman XII,
2 testimony from victims regarding their views on materiality,
3 I agree with your reading of the Litvak case, like, yes, the
4 subject of decision making processes of specific investors
5 can tend to inform, perhaps, the objective assessment of
6 what's material and what's not material, but you can't have
7 it both ways on this. And if you're going to want some limit
8 on the extent to which investors can be asked, you know, how
9 much was the race of the founders relevant to you in your
10 investment process or whatever, you can't then oppose that on
11 the basis that, oh, that goes to subjective motivation, not
12 objective motivation, right?

13 MR. SIEGEL: Well, on the race example, that's less
14 about subjective, objective, and more about relevance and
15 about prejudice. But in terms of, if they want to ask an
16 investor, "Did you think revenue was important?", that's
17 fine. And if there's an investor who will say, "No. I
18 didn't think that was important," then that's fine too.

19 THE COURT: All right. I'm going to reserve
20 judgment on that. So item 13, I agree, you know, the
21 subjective belief that even though I was lying to investors
22 and those lies were material, that everything would work out
23 in the end and nobody would lose money, is not a defense.
24 That line will be hard to police in practice, but that
25 motion, I think, is indisputably correct.

1 MR. SULLIVAN: And that's not and never has been
2 our argument.

3 THE COURT: Yeah. Roman XIV, argument that Watson
4 did not profit from the scheme, I mean, the fact -- so what
5 about the idea that he lost money, because as the ship was
6 potentially going down, he's injecting more of his own
7 capital into the business? Is that relevant to his intent or
8 any other subject? I think I got the suggestion from the
9 defense briefs that that happened, or that they think it
10 happened.

11 MR. SIEGEL: I think if there's argument that I put
12 money into OZY and I believed in OZY, because I believed it
13 was making money, or however he wants to link it up, that's
14 fine.

15 THE COURT: Okay.

16 MR. SULLIVAN: And also that the way the Government
17 frames it did not profit --

18 THE COURT: But then what is number 14? That he
19 didn't profit. I take that to mean he wasn't -- he is
20 profiting on paper, right? If they're raising money at
21 successively higher valuations, then he would marking his
22 investment up in value. But I think you're saying he's not
23 taking any money out of the business.

24 MR. SIEGEL: It's the argument that, well, in the
25 end, I never made a dollar on this because the company

1 collapsed.

2 THE COURT: Why is that different from what I just
3 posited about him putting more money in? Not taking money
4 out, is the other side of the same coin.

5 MR. SIEGEL: Well, it's not about putting the money
6 in or taking it out. It's the fact that this conspiracy
7 didn't work.

8 THE COURT: The jury will be clear that the fact
9 that he didn't mint millions is not a defense, obviously, but
10 to the extent his intent is an issue, I don't know if he ever
11 had the opportunity to take money out of this business.
12 There may have been insufficient cash flow for that purpose.
13 But you see the relevance and I think you agree.

14 MR. SIEGEL: Yeah. No. In terms of whether he
15 took money out, whether he tried to take money out, we think
16 that's fair and we're going to have evidence on that. It's
17 the issue of what you put your finger on, the fact that he
18 didn't mint millions is not a defense and shouldn't be argued
19 as a defense.

20 THE COURT: Okay.

21 MR. SULLIVAN: But it goes to intent, and to the
22 extent intent is a defense. I just want to make sure we're
23 on the same page of music. Whether he made money as OZY was
24 going on is relevant to his intent and what the Government is
25 arguing. Whether he took money out is relevant to his

1 intent, is relevant to good faith.

2 THE COURT: I mean, the Government --

3 MR. SULLIVAN: I think that's what the Government's
4 saying that they're not objecting to, but I just want to be
5 clear, it is not an affirmative defense. Maybe that's the
6 better way to put it, but intent is a defense.

7 THE COURT: I think we're all on the same page
8 here. I think we're in --

9 MR. SULLIVAN: I think so.

10 THE COURT: -- something like unanimous agreement.
11 The Government is, not in this case, but in many corporate
12 fraud causes, is seeking affirmatively to admit evidence of a
13 defendant's lavish lifestyle on the theory that that all
14 provides a motive to continue to lie, and the Department of
15 Justice obviously should not want to have it both ways on
16 that issue, to the extent that, you know, the defense never
17 pays himself a dividend.

18 MR. SIEGEL: The fact that he didn't get paid
19 during the course of the conspiracy, I mean, as Your
20 Honor -- we are going to admit evidence that he tried to take
21 money out and was not able to, but it's the question that
22 we're getting to is the point that Your Honor raised, the
23 fact that he didn't mint millions is not a defense.

24 THE COURT: Agreed. Although I think that's a
25 question of degree rather than kind. Okay.

1 MR. SIEGEL: Your Honor, I'm sorry, did we address
2 Roman numeral V? You mentioned that you agree that reliance
3 is not an element, but there's been a lot of talk about sort
4 of disclaimers of unaudited and pro forma, and we just want
5 to make clear that just because you call something unaudited
6 or pro forma doesn't give you a license to mislead people
7 about it.

8 THE COURT: Yeah. Pro forma can mean a lot of
9 things, I guess. I think of pro forma financial statements
10 in the merger context, where we say here's what the combined
11 company would have earned, had these two parties actually
12 been combined. It's almost a counterfactual. Pro forma
13 could just mean, here's what we expect to earn. You know, to
14 me that distinction is better described as historical
15 performance versus forward-looking statements of performance.
16 To the extent there are statements that were labeled -- you
17 know, I think this comes down to the expert testimony, right?

18 If there is an expert whose testimony is admitted,
19 over all the different objections we have to that, I don't
20 see why it would be inappropriate for that expert to say,
21 look, obviously, there's a difference between financial
22 statements that speak to historical performance, which is
23 actually known and knowable, and projections. Or, you know,
24 unaudited financial statements, like, I don't think anybody's
25 going to say that you're allowed to lie on the unaudited

1 financial statements in the hopes that your auditor will
2 clean that up in the audited ones. That would strike me as
3 strange testimony and probably lack a sufficient basis in the
4 literature. But, you know, everybody knows that unaudited
5 financial statements are still subject to change.

6 MR. SIEGEL: So we're focused on the historicals,
7 and the motion that we're making, which is based on the law
8 that reliance isn't an element and disclaimers for reliance
9 aren't an element, that if you give someone a historical
10 number and say, "This is not audited," that you can't then
11 point to that and say, "Well, I mean, so what that it was off
12 by \$30 million and we knew it was off by \$30 million?"

13 THE COURT: Agreed. That would not be a defense,
14 and I don't think anybody's going to say it is.

15 MR. SULLIVAN: And that's not what we're saying.
16 So here's the problem. The Government phrases these things,
17 where it superimposes its theory on everything. So the
18 Government says in number 5, for example, "Watson or
19 conspirators' false statements." Of course not. Our theory
20 is that the statements are not false. The statements are not
21 false, that they are pro forma, they are unaudited. They're
22 not false.

23 There was a good faith belief based on evidence
24 that we will elicit, that these numbers were real. That they
25 were, you know, maybe with a little bit of variance, but not

1 false. You know, that would be silly for us to say that you
2 shouldn't rely on false -- no. You shouldn't rely on false
3 numbers. But the numbers that they put out there, they
4 believe to be true.

5 THE COURT: Is this all about revenue recognition
6 again?

7 MR. SIEGEL: I don't think so. I mean, look --

8 THE COURT: There's a rule somewhere that
9 somebody's going to need to tell me about when the company
10 could recognize -- what was the company selling? They were
11 selling podcasts, or advertising in podcasts, and --

12 MR. SULLIVAN: Television programs, festivals.
13 Mixed base in the media.

14 THE COURT: Okay. So say -- I don't know who's
15 going to be an advertiser. Crest toothpaste wants to
16 advertise on YouTube videos that this company's going to put
17 up. There's a rule somewhere that says, "Here's when you can
18 recognize revenue associated with those contracts." I assume
19 that rule's going to say you can recognize the revenue only
20 when you have two signatures on the contract, one from Crest
21 toothpaste and one from OZY Media. And if you're putting
22 that contract in revenue despite it not being signed, it's
23 still a lie, obviously, despite the fact that that first
24 draft of a financial statement has not been audited.

25 MR. SULLIVAN: I think that Your Honor will learn

1 that in the early startup space, that some of the sort of
2 traditional accounting rules are not in play, because they
3 simply don't know. So what Your Honor --

4 THE COURT: Yeah. I got to run because I have a
5 12:30 call.

6 MR. SULLIVAN: Okay.

7 THE COURT: I doubt I'm going to learn from any
8 expert that it is okay to lie about your revenue just because
9 your financial statements have not yet been audited.

10 MR. SULLIVAN: And I would just say you can't
11 accept the Government's premise. There are no lies here.
12 There are no lies here. They're good faith estimates as to
13 what it was.

14 THE COURT: Well, what we're going to have to talk
15 about -- if I'm trying to run the move forward here in my own
16 mind, it may be that the defense is going to want to say,
17 "Yeah. We didn't have Crest toothpaste's actual signature on
18 the advertising contract yet, but we were highly confident it
19 was going to come in."

20 MR. SIEGEL: Judge, I just want to cut through all
21 this. We're not making any arguments about, "Oh this was
22 recognized in December and it should've been recognized in
23 January." Our argument is the revenue was six. They told
24 investors the revenue 53 million, and the way they got --

25 THE COURT: But they're going to say, maybe, "We

1 were in talks with these other 15 advertisers and I had the
2 world's best good faith belief that those contracts were all
3 going to come in."

4 MR. SIEGEL: But this is historical. "Last year we
5 made 6, we told people we made 53, and the way we came to
6 that number is we thought, 'What number would sound good?
7 Fifty-three sounds good.'" Those are the lies we're talking
8 about.

9 THE COURT: But does 53 change from unaudited to
10 audited? Why does this whole --

11 MR. SIEGEL: It's a made-up number.

12 THE COURT: So then why does the whole concept of
13 what an unaudited financial statement is matter to this
14 trial?

15 MR. SIEGEL: Because --

16 THE COURT: Or maybe you're saying it doesn't.

17 MR. SIEGEL: -- you can't give someone made-up
18 number and say unaudited, and then argue, "Well, it was
19 labeled unaudited, so that's not material."

20 MR. SULLIVAN: And that's just wrong. I know Your
21 Honor has to go. May I do two things in two minutes?

22 THE COURT: Yes. Two real minutes.

23 MR. SULLIVAN: One, is this courtroom equipped with
24 the --

25 THE COURT: So that you're going to take up with

1 the Court's law clerk and staff after I leave. All the stuff
2 about audio, video. I do want everybody to really understand
3 how the tech is going to work so we don't waste the jury's
4 time with technological difficulties, but I don't want to be
5 here for that conversation.

6 MR. SULLIVAN: Absolutely. The second question,
7 then, or issue is more substantive, and we might take this up
8 later as well. Just the timing. I don't have the number in
9 front of me, but the notion of what evidence about Ben Smith
10 and Busby may be relevant.

11 THE COURT: None.

12 MR. SULLIVAN: I'm sorry?

13 THE COURT: None.

14 MR. SULLIVAN: Our position is that if the
15 Government produces a theory that suggests that OZY fails
16 because of either misrepresentations or the absence of
17 revenue, then we are able to tell a story that OZY fails
18 because a competitor with inside information tainted. They
19 don't have the exclusive right to a theory about why a
20 business fails. So we think that this is going to be part of
21 their case, and if they open the door to that, we get to tell
22 our story about why it ultimately didn't make it.

23 THE COURT: We'll take this up again. This sounds
24 like some sort of loss causation argument that you all are
25 going to have investors testify that they lost all their

1 money and that that loss hurt them, and the defense is
2 saying, "Well, absent this short squeeze or competitors
3 maligning us," or whatever the alternative cause is,
4 "everything would've worked out beautifully in the end."
5 We'll take that up at a next conference.

6 MR. SULLIVAN: Very well.

7 THE COURT: Why don't we schedule that next
8 conference now for the afternoon of May 8th, 2:30 p.m.? Is
9 that after voir dire has come in? Jury instructions have
10 come in?

11 MR. SIEGEL: Yes, Your Honor.

12 THE COURT: What's the due date for all of that?
13 It's key to my --

14 MR. SIEGEL: May 6th.

15 THE COURT: Okay. So yeah, two days after, we'll
16 have everything.

17 MR. SULLIVAN: I'm sorry, Your Honor. What time?

18 THE COURT: 2:30 p.m., May 8th. Please, everybody
19 should be highly cognizant of the deadlines in my individual
20 rules and practices. I think they say before jury selection,
21 but if I say before trial, I'm thinking of trial as starting
22 the first day of jury selection. All requests for jury
23 instructions should come to me. Even though there is a
24 magistrate judge picking the jury, to the extent there's any
25 dispute about who's going to say what concerning the case or

1 beginning to instruct the jury -- I don't think the
2 magistrate judge is going to give any instructions, other
3 than things like don't read about this case in the media.

4 MR. SIEGEL: Judge, in our motion that we didn't
5 get to, there's motion about discovery deadlines, and
6 obviously we can't address it, but obviously, we do need that
7 decided so that we all know what deadlines we're talking
8 about.

9 THE COURT: Discovery deadlines --

10 MR. SIEGEL: Of, like, when exhibits are due from
11 both sides.

12 THE COURT: Oh. What do my individual rules say?

13 MR. SIEGEL: Your individual rules, I believe, say
14 10 days before trial, so we keyed it to May 10th, so we have
15 it for May 10th for both sides.

16 THE COURT: Okay. There you have it.

17 MR. SIEGEL: Okay.

18 THE COURT: All right. Thank you all. We will be
19 adjourned.

20 (Proceedings adjourned at 12:31 p.m.)
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TRANSCRIBER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

April 30, 2024

Laura Hunt

Laura Hunt

DATE

Legal Transcriber